SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 52

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO, PETITIONER,

vs.

UNITED STATES, EX REL. EDGAR I. SHOTT, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 30, 1965

[fol. A] [File endorsement omitted]

[fol. 1]

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 15,538

UNITED STATES OF AMERICA, ex rel.
EDGAR I. SHOTT, JR., Relator-Appellant,

v.

DAN TEHAN, Sheriff of Hamilton County,
Respondent-Appellee.

On Appeal From the United States District Court for the Southern District of Ohio, Western Division

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Appellant's Appendix—Filed September 17, 1963

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

Civil No. 5376

DOCKET ENTRIES

6-24-63—Petition for Writ of Habeas Corpus Filed,—together with Court Transcript and Appendix A.

6-24-63—Order to Show Cause.—hearing to be held June 27, 1963 at 10:30 A.M.—2 certified copies delivered to the U. S. Marshal.

[fol. 2] 6-25-63—Memorandum In Support of Petition For Writ Of Habeas Corpus, filed. Given to Mr. Andrews to deliver to Judge Peek.

6-27-63—Hearing on Merits of the Petition—Arguments Of Counsel for Petitioner—Arguments of Counsel for Dan Tehan, Sheriff, Rebuttal argument—Cause Submitted to Court.

7-9-63—Memorandum Opinion and Order—that the petition herein is hereby dismissed, with notation of petitioner's exception.

7-10-63—Motion for Release of Relator-Appellant Pending Appeal filed by Relator together with Memorandum of Authority—to be heard June 10, 1963 at 2:00 P.M.

7-10-63—Notice of Appeal filed by Relator. Copy mailed to opposing counsel.

7-10-63—Hearing on Relator's Motion for Release of Relator—Pending Appeal. Bond set at $6,000.00.

7-10-63—Order Releasing Relator-Appellant Pending Appeal, with notation that Relator is permitted travel to the District of Columbia to confer with his counsel.

7-10-63—Relator released on $6,000.00 Supersedeas Recognizance Bond.

7-10-63—Bond filed.

7-22-63—Application of Appellant for a Certificate of Probable Cause filed—Hearing 8-12-63.

7-29-63—Order Extending Time to September 3, 1963 for filing a transcript of record and brief with U. S. Court of Appeals.

8-12-63—Hearing on Application of Counsel For Appellant for a Certificate of Probable Cause—no resistance to this motion—draft of entry to come, dated as of today.

8-12-63—Certificate of Probable Cause pursuant to the requirements of Section 2253, Title 28 U.S.C. entered.

[fol. 3]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

No. 5376

UNITED STATES OF AMERICA, ex rel.
EDGAR I. SHOTT, JR., Relator,

v.

DAN TEHAN, Sheriff of Hamilton County, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 24, 1963

To the Honorable United States District Court for the Southern District of Ohio, Western Division:

The petition of Edgar I. Shott, Jr., respectfully shows:

1. That he is a citizen of the United States of America and of the State of Ohio and is an attorney and a member of the bar of the State of Ohio.

2. That he is at present unconstitutionally detained, within the District for which this Court sits, by Dan Tehan, Sheriff of Hamilton County Ohio, Respondent herein, by virtue of a judgment and sentence of imprisonment of one to five years at hard labor to be served in the State Penitentiary, which was pronounced upon Petitioner Edgar I. Shott, Jr. by the Court of Common Pleas, Hamilton County, Ohio, on July 19, 1961, upon his conviction of two violations of the Ohio Securities Act, Ohio Rev. Code 1707.01-1707.45.

3. That petitioner has exhausted all state remedies, including an appeal to the United States Supreme Court as

required by Title 28, U.S.C. Sec. 2254. The steps taken by petitioner to exhaust the state remedies were as follows:

a. On August 14, 1961, petitioner filed a timely appeal from his conviction to the Court of Appeals, First Appel- [fol. 4] late District of Ohio, Hamilton County, Ohio, designated as appeal No. 9019. On December 11, 1961, the Court of Appeals affirmed the judgment of the Court of Common Pleas, Hamilton County, Ohio.

b. On February 9, 1962, petitioner filed in the Supreme Court of the State of Ohio a timely appeal from the Court of Appeals of Hamilton County, Ohio and a timely Motion for Leave to Appeal from the Court of Appeals for Hamilton County, both designated as No. 37456. On June 27, 1962, the Supreme Court of the State of Ohio dismissed the Appeal and overruled the Motion for Leave to Appeal.

c. On July 10, 1962, petitioner filed in the Supreme Court of the State of Ohio a timely motion for rehearing in No. 37456. On October 3, 1962, the Supreme Court of the State of Ohio denied rehearing.

d. On December 29, 1962, a timely notice of appeal to the United States Supreme Court was filed in the Ohio Supreme Court. On February 27, 1963, petitioner filed a Jurisdictional Statement in the United States Supreme Court in support of his appeal, which was designated No. 877. On April 1, 1963, the State of Ohio, appellee in No. 877, filed a Motion to Dismiss the Appeal. On May 13, 1963, in a *per curiam* opinion in which Mr. Justice Black dissented, the Supreme Court dismissed No. 877 and, treating the papers as a petition for certiorari, denied certiorari.

e. On June 7, 1963, petitioner filed in the United States Supreme Court a timely petition for rehearing of its decision in No. 877. On June 17, 1963, the petition for rehearing was denied.

4. That petitioner is restrained and detained pursuant to a sentence that is illegal and void in that in his trial before the Court of Common Pleas, Hamilton County,

Ohio, petitioner was denied due process of law as guaran-
[fol. 5] teed by the Fourteenth Amendment to the Constitution of the United States, to wit:

a. The Ohio Securities Act, as interpreted and applied in this case, where the evidence demonstrated only that petition had in a single, private transaction given a promissory note to a friend in exchange for a personal loan, failed to provide notice that the petitioner's conduct was criminal; that statute thereby was void for vagueness, its application here to petitioner denied due process, and petitioner's conviction thereunder was unlawful.

b. The Ohio Securities Act, as interpreted in this case, placed the burden of proof of demonstrating his innocence upon petitioner rather than placing the burden of proof upon the State of Ohio to prove petitioner's guilt, thereby denying petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

c. The Ohio Securities Act as, interpreted in this case, created an invalid and unconstitutional statutory presumption, which was the sole basis of petitioner's conviction, and thereby denied petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

d. The prosecutor's closing argument to the jury, in which he berated petitioner for not taking the stand in his defense, in the particular circumstances presented in this case where there was no evidence in the record inconsistent with the innocence of petitioner, deprived petitioner of due process of law as guaranteed by the Fourteenth Amendment to the Constitution.

5. The facts and circumstances under which the denial of petitioner's constitutional rights (as set forth in paragraph 4, *supra*) took place are as follows:

a. On May 12, 1961, petitioner was indicted by the Grand Jury of Hamilton County, Ohio, for two alleged violations
[fol. 6] of the Ohio Securities Act, Ohio Rev. Code 1707.01-

1707.45. The first count of the Indictment alleged that petitioner:

> "... did unlawfully sell ... to Patrick Sestito, a security, to wit, a written instrument evidencing a promise to pay money, which the said Edgar I. Shott, Jr. .... was not then and there licensed to sell securities in accordance with the provisions of the Ohio Revised Code 1707.01 to 1707.45...."

The second count of the Indictment alleged that petitioner:

> "...did knowingly, unlawfully and intentionally sell ...to Patrick Sestito, a security, to wit: A written instrument evidencing a promise to pay money which security was not then and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio law...."

b. On June 28, 1961, the first day of petitioner's trial, petitioner, by demurrer, charged that the Ohio Securities Act under which he was indicted was so vague and indefinite as to be void under the due process clause of the Fourteenth Amendment. The trial court, without benefit of oral argument, overruled the demurrer and proceeded to receive evidence. This constituted a deprivation of due process of law inasmuch as the Ohio Securities Act on its face fails to provide notice of the conduct it made criminal. (A copy of the transcript of petitioner's trial—including opening and closing arguments of counsel, the evidence, and the Court's instruction to the jury—is annexed hereto as Appendix A.).

c. The transcript of the evidence introduced in petitioner's trial shows the following relevant facts. Only two witnesses were called by the State of Ohio. The first was [fol. 7] an Attorney Examiner of the Ohio Division of Se-

curities who briefly testified that petitioner was not a registered securities dealer and that the single promissory note made by petitioner, which was the basis of the entire criminal action, was not registered with the Ohio Division of Securities. The second witness, Sestito, who was the creditor in the loan transaction, described the circumstances surrounding the making of this personal loan. He testified that he was an old friend and client of petitioner and that on September 28, 1960 he paid a social call upon petitioner:

"Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960?

A. No, sir, not that I can remember.

Q. Had you telephoned to Ed?

A. No, sir.

Q. Or made any contact with him?

A. No, sir, I just dropped in.

Q. When you dropped in, was there any purpose for your dropping in on that date?

A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him." (Tr. Trans. 14)

When Sestito arrived, petitioner asked him if he wanted to make some money. He offered to borrow from Sestito any sum that the witness could conveniently loan at an interest rate of twelve and a half percent for sixty days:

"Q. Did he ask you for any money?

A. Yes, he did.

Q. Did he ask you for any particular amount?

A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good?

A. Well, the percentage, twelve and a half per cent." (Tr. Trans. 15)

The whole transaction was summarized by the prosecution's witness as follows:

"Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he [fol. 8] would like to borrow some money from you didn't he?

A. That's right.

Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time?

A. That's right.

Q. And you trusted Ed Shott?

A. That's right.

Q. And you trusted his ability to pay it back to you.

A. Yes, sir, I did." (Tr. Trans. 21)

Sestito agreed to loan petitioner $2,000, and the two parties decided to lump the principal and interest on the face of the note. The note made by petitioner and given to Sestito on that occasion was introduced as State's Exhibit 1:

"$2250.00 Cincinnati, Ohio, September 28, 1960

Sixty (62) (sic) days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 Dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court of Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

SHOTT INVESTMENT CO.

By: EDGAR I. SHOTT, JR.

No. .....

Due November 29, 1960"

d. Sestito testified that he loaned petitioner $2,000 strictly on the basis of his long acquaintance, personal friendship, and his trust that petitioner would repay the loan:

> "Q. (by petitioner's counsel) As a matter of fact, Pat, you knew Ed (Shott) all these years and you [fol. 9] knew if you loaned him money he would pay it back to you, isn't that right?
>
> A. (by creditor Sestito) Yes, I trusted him." (Tr. Trans. 23)

e. Further, although the note was signed "Shott Investment Co., By Edgar I. Shott, Jr.," creditor Sestito testified that his decision to make the loan to petitioner was based upon petitioner's personal reputation:

> "Q. (by petitioner counsel) You didn't pay any attention to how it was signed or anything else?
>
> A. (by Creditor Sestito) That's right." (Tr. Trans. 23)

There was no security for the loan except Shott's own reputation. The loan agreement did not contemplate the subsequent delivery of stock or any other securities to Sestito; nor did Sestito thereby gain an ownership interest in any corporation or other enterprise. Creditor Sestito testified that petitioner "didn't sell (him) anything."

f. Sestito testified that this was the only loan transaction between them. He further stated that when due the loan was repaid in full, long prior to the institution of the state criminal action.

g. Petitioner did not take the stand in his defense, and petitioner introduced no evidence in his behalf.

h. After the State rested its case solely on the basis of the single Sestito loan, petitioner moved for a directed verdict of acquittal; the state trial court overruled this motion without permitting counsel to present his arguments.

i. On the basis of the evidence introduced by the State, it was a violation of the due process clause in this case for the trial court by its instructions expansively to interpret the criminal provisions of the Ohio Securities Act, in such a manner, that as a matter of law, the Sestito promissory [fol. 10] note was a "security" within the contemplation of the Ohio Securities Act and that this "security" had not been registered as required by law; that because of this single, private transaction petitioner was a "securities dealer" required to be licensed by the state; that petitioner's act of making the Sestito note and handing it to Sestito constituted the "sale" of a security; that whether petitioner thought the single promissory note was not a "security" was immaterial; that the criminal provisions of the Act establish a standard of strict liability requiring no common law *mens rea* and that petitioner can be convicted of a felony which subjects him to imprisonment for a term of one to five years even though there is no proof of petitioner's criminal intent. By so expanding the relevant provisions of the Act by interpretation, in violation of the principle of strict construction of criminal laws, and applying them to the evidence here, petitioner was denied due process of law. No reading of the Ohio Securities Act could have put petitioner on notice that the conduct proved by the State constituted a violation of the Act. For this reason, the Act as applied in this case, is void for vagueness and its application here deprived petitioner of due process of law.

j. In further violation of petitioner's constitutional right of due process of law and his constitutional right against self-incrimination, the prosecutor in his closing argument to the jury attacked petitioner for not taking the stand in his defense:

> "Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, 'You can't get me; you can't convict me.' That is what he said.

Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September [fol. 11] of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, 'Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal.' Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you 'Members of the jury, what I did was proper?' He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960." (Tr. Trans., pp. 36-37).

Petitioner was further denied due process of law inasmuch as the prosecuting attorney in his closing argument attempted to introduce "evidence" of an alleged series of loan transactions made by petitioner which purportedly transformed the single private Sestito loan into a part of a "public offering" of petitioner's "securities:"

"(The prosecutor): Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—

"Appellant's counsel: I will object to that, Your Honor.

"The Court: Objection overruled." (Tr. Trans. 37).

"(The prosecutor): And there (Appellant) sits. For just one reason, because he can't look you in the eye.

> He can't tell that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed." (Tr. Trans. 56-57).

[fol. 12] The prosecutor, having repeatedly misstated in closing argument that the evidence indicated that there was a series of transactions constituting a public offering of petitioner's promissory notes, again attacked petitioner for exercising his constitutional rights, protected by the Fourteenth Amendment, not to incriminate himself. In the light of the evidence introduced by the State, none of which was inconsistent with the innocence of the accused, it constituted a deprivation of due process for the prosecutor to attack petitioner as follows:

> "How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, 'Ladies and gentlemen of the Jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito.' He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify." (Tr. Trans. 56).

k. In instructing the jury, the trial court interpreted the Ohio Securities Act to impose upon petitioner the burden of proving his innocence. The Court charged that even though the substantive provisions of the Act do not make unlawful single, isolated transactions, the Act requires that the petitioner must prove that a single promissory note introduced into evidence was not part of an unlawful public offering—that is that petitioner must prove his innocence rather than the State of Ohio prove his guilt. It was a deprivation of due process of law in the circumstances of

this case for the trial court to interpret the Securities Act to shift the burden of proof to petitioner solely upon the basis of evidence introduced by the State which indicated merely a single, private promissory loan transaction, it-[fol. 13] self an innocent transaction, which carried no sinister significance with it nor a hint of criminality. The trial court instructed that:

> "The statutory provision (of the Ohio Securities Act) makes it the duty or burden of the Defendant to prove by a preponderance of evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public." (Tr. Trans. 68).

l. In further instructing the jury, the trial court held that the Ohio Securities Act created a statutory presumption, sufficient to establish petitioner's guilty conduct of making an unlawful public offering of securities, based solely upon evidence of a single promissory note made to a friend. The Court instructed the jury that upon the basis of evidence of the single loan transaction, which had been introduced by the State, the Act "creates a presumption that an instrument which is a security is not exempt." (Tr. Trans. 68). In so interpreting the Act to permit the use of such a statutory presumption, petitioner was denied due process of law. Inasmuch as there is no rational connection in common experience between the act proved—making a single promissory note—and the acts inferred in the substantive presumption—making a public offering of securities—the substantive presumption is invalid and unconstitutional and its use in petitioner's conviction denies petitioner due process of law.

m. Before the trial court and on successive appeals to the Ohio Court of Appeals and the Ohio Supreme Court, the petitioner explicitly charged that the Ohio Blue Sky Law under which he was convicted was invalid on its face and as applied under the due process clause of the Fourteenth Amendment because it set no ascertainable standard

of conduct, required no specific intent, and was so indefinite and vague as to be void. Further, petitioner has specifically [fol. 14] challenged the wrongful imposition of the burden of proof upon him, the unlawful presumption, and the misconduct of the prosecutor in closing argument. Although neither Ohio appellate court wrote an opinion, by their *per curiam* affirmances both courts necessarily rejected such constitutional arguments.

6. That no previous application to this Court has been made for the writ of habeas corpus.

Wherefore, petitioner prays:

1. That a writ of habeas corpus be directed to the respondent issued on his behalf so that the petitioner may be brought before this court,

2. That respondent be required to appear and answer the allegations of this petition,

3. That, after a full and complete hearing, this Court relieve petitioner of the unconstitutional detention and sentence of imprisonment,

4. That respondent be ordered to stay the execution of judgment and imprisonment of petitioner and refrain from otherwise taking any action or proceeding against petitioner pending final determination of this petition,

5. That the Court grant such other, further and different relief as to the Court may seem just and proper under the circumstances.

Edgar I. Shott, Jr., Petitioner.

[fol. 15]

EXHIBIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

INDICTMENT

THE STATE OF OHIO, HAMILTON COUNTY

The Court of Common Pleas of Hamilton County: Term of April in the year nineteen hundred and sixty one Hamilton County, ss

The Grand Jurors of the County of Hamilton, in the name and by authority of the State of Ohio, upon their oaths present that

EDGAR I. SHOTT, JR.

on or about the TWENTY EIGHTH day of SEPTEMBER in the year nineteen hundred and SIXTY at the County of Hamilton and State of Ohio, aforesaid, did unlawfully sell, cause to be sold, offer for sale, or cause to be offered for sale to PATRICK SESTITO, a security, to-wit, a written instrument evidencing a promise to pay money, which the said EDGAR I. SHOTT, JR., hereinbefore mentioned was not then and there licensed to sell securities in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45 inclusive, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that

EDGAR I. SHOTT, JR.

on or about the TWENTY EIGHTH day of SEPTEMBER, in the year nineteen hundred and SIXTY, at the County of Hamilton and State of Ohio aforesaid, did knowingly, unlawfully and intentionally sell, cause to be sold, offer for sale or

cause to be offered for sale to PATRICK SESTITO, a security, [fol. 16] to-wit: A written instrument evidencing a promise to pay money, which security was not then and there registered by description nor then and there registered by qualification in accordance with the provisions of Ohio Revised Code 1707.01 to 1707.45, inclusive, and which security and transaction was not then and there registered or exempted by Ohio law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ C. WATSON HOVER
Prosecuting Attorney
Hamilton County, Ohio

[fol. 17]

EXHIBIT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

TRANSCRIPT OF PROCEEDINGS, STATE v. SHOTT, COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

IN THE COURT OF COMMON PLEAS OF HAMILTON COUNTY, OHIO

STATE OF OHIO, PLAINTIFF,

vs.

EDGAR I. SHOTT, JR., DEFENDANT.

BILL OF EXCEPTIONS—June 28-30, 1961

Be it remembered that the above-entitled cause came on for trial at the April, 1961, Term of said Court of Common Pleas, before the Honorable Charles E. Weber, one of the Judges of said Court of Common Pleas, the issues joined, a jury being duly impaneled and sworn, the following proceedings were had, to-wit:

Appearances:

HARRY C. SCHOETTMER, Esq., and CALVIN W. PREM, Esq., For the Plaintiff; and

JOHN A. LLOYD, JR., Esq., and JAMES G. ANDREWS, JR., Esq., for the Defendant.

PROCEEDINGS

Wednesday, June 28, 1961.

Mr. Lloyd: Your Honor, the Defense is ready for trial.

The Court: Yes. We have a demurrer. I don't see the prosecutor. Wait until the prosecutor comes. There was a demurrer on which I am to rule. I am going to overrule the demurrer at this time.

You may proceed.

Mr. Lloyd: If your Honor please, we have a matter to take up with the Court before the jury comes in. I think it might be better handled before the jury comes in.

The Court: Yes.

[fol. 18] Mr. Lloyd: I would like to say this: We believe that a certain question of evidence will arise in this case, and we would like to take the matter up with the Court now, so that he may be prepared for our objection at the time it is raised and because the evidence question relates to certain matters which are involved in opening statement.

Now, we assume that the State of Ohio may attempt to bring into this trial evidence of other transactions; that is, collateral acts entered into by this Defendant with persons other than the person named in the indictment. We believe that, in light of all the circumstances involved in this case and in accordance with certain established precedents on the law of evidence, that such evidence is clearly inadmissible. We believe, furthermore, that in the light of this rule of law, the prosecuting attorney should not be permitted, in his opening statement, to make any reference to any collateral acts or any collateral transactions entered into between this Defendant and any person except the person named in the indictment.

Now, in support of that position, we have prepared a memorandum.

(Arguments of counsel omitted.)

The Court: I had the same question, of course, which you know, in the other case. I don't see how I can rule on anything of that kind. At least, it is presumed, and I think it is correct, I do not know the details of this particular case or the position of the parties, all I have before me is an indictment charging him with violation of the Security Law in two respects, without a license and without having the particular document registered.

Now, of course, I know a little bit about the general setup here, but I do not know, and I cannot rule in advance, but I can at this time that I am of the opinion, normally, that such evidence is competent.

Mr. Schoettmer: We think counsel is premature, your [fol. 19] Honor. I think this Court cannot rule on something until it comes before it.

The Court: I cannot rule on anything unless I know the language used, how it is used, and so forth, because all of you know, of course, that evidence or statements sometimes are competent in one sitting and they would be totally incompetent in another sitting, so I can't rule on that at this time.

All right, bring in the jury.

Mr. Lloyd: I make a motion for a separation of witnesses.

The Court: All who expect to be witnesses in this case must leave the court room. Stay in the hall until you are called. You cannot be a witness if you stay in the court room.

(Thereupon the prospective jury was brought into open Court. Voir dire of the jury omitted.)

Opening Statements

Mr. Prem: Your Honor, counsel, ladies and gentlemen of the Jury: In this case, and if you recall Mr. Schoett-

mer's statement to you previously, he indicated in the procedural workings of a trial that there would be a place where the attorneys would address you and tell you what they expect the evidence in the case to show. That is where we are right now. This is a place in the trial that we refer to as the opening statements of counsel. This is a place where we, as attorneys for either side in this case, have a privilege or an opportunity to speak directly to you and tell you what we expect to show, what we think the evidence will prove.

I would like to make a preface to my opening statement and that is, I would like to say that nothing that I am about to say by way of opening stand, and nothing that either Mr. Lloyd or Mr. Andrews might say in their opening statement is the evidence in this case, nor is the law in this case. [fol. 20] The evidence is what you hear from the witness stand from the witnesses who testify, and the law is what Judge Weber will instruct you in at the end of the case. In other words, you get the law from the Judge, the evidence from the witnesses, so regardless of what we may say as attorneys, we are merely telling you what we expect to prove.

Now, with that thought in mind, the State of Ohio in this case expects that the evidence will show that the Defendant in this case, Edgar I. Shott, Jr., is an attorney, and that Patrick Sestito, who will testify as a witness, is a man who follows an occupation as a salesman.

The evidence will show that on or about the 28th day of September, 1960, Patrick Sestito came into contact with Mr. Shott at Mr. Shott's office and had a conversation with Mr. Shott concerning an organization which will be referred to as the Shott Investment Company; that as the conversation proceeded and developed, Mr. Sestito invested money, $2,000.00 in cash money, with Mr. Shott, and in exchange for giving Mr. Shott the $2,000.00 on that date, here in this county, Mr. Shott gave him a security evidencing a promise to repay that money, a piece of paper promising to repay that money within a certain period of time, 62 days, I believe, the testimony will be.

The evidence will show that on this date Mr. Shott was not licensed by the State of Ohio to deal in securities, to sell securities; that, in fact, he has never been licensed to sell securities by this state, or in this state.

The evidence will further show that on the 28th day of September, 1960, that security given by Mr. Shott to Mr. Sestito was not registered with the Department of Securities, the Division of Securities of this state, and that the State of Ohio feels that when you have heard all of the evidence, you will find that Mr. Shott, Edgar I. Shott, did, in fact, sell a security to Patrick Sestito on the 28th day of September, 1960, in this county, and that he was not at that time licensed; and as evidence in the second count [fol. 21] of the indictment, that on that date he did, in face, sell a security to Patrick Sestito, which security was not registered under the laws of this state.

Mr. Lloyd: Your Honor, Judge Weber, Mr. Prosecutor, Members of the Jury, the defense is anxious to state to you what we believe that the evidence in this case will show. As you have been told, the Defendant, Ed Shott, is a lawyer, actively engaged in the practice of law in this community. He is being tried for alleged violation of the Ohio Securities Law, better known as the Blue Sky Law. If I seem to be reading a portion of my opening statement, it is because the defense believes that the whole, unmitigated truth, told accurately and precisely, will establish the Defendant's innocence. I am, therefore, not permitting myself that margin of error which is inevitably inherent in any extemporaneous statement, no matter how carefully it may be prepared.

This case is a very simple case. It is an unusual case in the sense that the facts will, or at least should, be agreed upon. The only serious differences of opinion will relate to the legal consequences of those facts.

The prosecuting attorney will not prove that Ed Shott violated the law of Ohio, because Ed Shott did not violate the law of Ohio. The evidence will show that this Defendant did not have a license to sell securities, and we will agree that he did not have a license. The evidence will show that

Mr. Shott never registered a security, or anything which these prosecuting attorneys believe to be a security, with the Division of Securities. We will agree that he never so registered anything purporting to be of that character.

The indictment alleges a transaction between this Defendant, Mr. Shott, and one Patrick Sestito. The evidence will show that Mr. Shott and Mr. Sestito have been friends for several years; that Sestito is a client of Mr. Shott's, and Mr. Shott has represented him professionally on several occasions, first beginning in 1956. The evidence will show that their relationship has been a continuing and a [fol. 22] cordial one and, to the best of the Defendant's knowledge, still is.

Now, the indictment alleges that the Defendant sold a security to Pat Sestito. The evidence will demonstrate that this is not true. Ed Shott negotiated a simple loan with Pat Sestito, and at the time when the amount of the loan and the terms and conditions of the loan agreement has been worked out, this loan agreement was reduced to a writing, which we will admit constitutes a promissory note.

The Court: I didn't quite get that.

Mr. Lloyd: I say it was reduced to a writing, which we will admit constitutes a promissory note.

The Court: Yes.

Mr. Lloyd: Sestito handed Shott the sum of $2,000.00 and Ed Shott gave Sestito a note in the amount of $2,250.00, payable in 62 days. The evidence will show that, while the parties to this loan transaction agreed that the note should bear interest at the rate of twelve and a half per cent for 62 days, they chose to incorporate the interest in the face amount of the note, rather than make a specific reference to principal and interest separately on the face of the note.

The evidence will further show that on or about the 29th day of November, 1960, 62 days after the note was executed, on the date when the note was due and payable according to its terms, the Defendant repaid Sestito the face amount of the note, the amount of $2,250.00, in full payment thereof.

Now, the Defendant will admit and concede precisely what his idea, what his scheme, plan and system was in entering into this loan transaction with Pat Sestito. It was simply this: The Defendant was loaning money to one Leslie D. Stickler, who was borrowing it regularly from him for the purpose, according to Stickler, of enabling Stickler to make short-term, high-interest loans to contractors. When Shott borrowed the money from Sestito, it was his intention; that is, Shott's intention and plan to loan this money to Stickler, and to pay Sestito for the [fol. 23] use of his money; that is, Sestito's money, one-half of the amount which Stickler had agreed to pay Shott for the use of Shott's money.

Now, the evidence will show that the note was signed, "Shott Investment, by Edgar I. Shott, Jr." Now, the Shott Investment Company, as the evidence will indicate, was a partnership, consisting of Edgar I. Shott, Sr., the Defendant's father, and Edgar I. Shott, Jr., the Defendant, Edgar I. Shott, Jr., as Trustee for Patricia Shott, Edgar I. Shott, Jr., as Trustee for his five-year old son, Gregory. The evidence will show the Defendant established this partnership upon the advice of an attorney specializing in tax laws in order to place income in the hands of various relatives for whom he wished to provide, and for the legitimate purpose of reducing his own income tax payments. That is all the Shott Investment Company was, or was ever intended to be.

The evidence will show that the note, which was executed, was paid off in full by Shott. It did not represent or evidence any interest or participation in the property or assets or profits of the Shott Investment Company, or Edgar I. Shott, Jr., individually, but was merely a debt against a partnership known as the Shott Investment Company; that it was not an investment, but a simple, unsecured promissory note; that it did not represent title to, or interest in, or was it secured by any lien or charge upon the capital, assets, the profits, the property or the credit of Edgar I. Shott, Jr., or of the Shott Investment Company, or of any other person or any public or governmental body,

sub-division or agency and, therefore, it was not a security; and that furthermore, the Defendant did not sell it and did not sell any property.

Therefore, as a consequence of these simple agreed facts, the Defendant was under no duty to get a license from the Division of Securities.

The Court: When you said "agreed facts", you mean facts that you admit or claim?

[fol. 24] Mr. Lloyd: That's right.

Mr. Schoettmer: There is no agreement by the State of Ohio.

Mr. Lloyd: I am saying to this jury, as a result—

The Court: I will have to sustain the objection when you say "agreed facts". The State hasn't agreed to anything.

Mr. Lloyd: Let me amend my statement then, your Honor, and I hope it will be permissible, and say, as a consequence of these facts which we believe the evidence will show, the Defendant was not under a duty to get a license from the Division of Securities, nor was he under any duty to register or to attempt to register any security or promissory note with the Division of Securities; that as a result of this loan transaction, Mr. Sestito suffered no loss but realized interest income in the amount of $250.00.

We believe the evidence will show, in finality and in summation, that Ed Shott violated no law and, therefore, is entitled to be declared not guilty.

Mr. Prem: William Reidenbach.

WILLIAM J. REIDENBACH, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Prem:

Q. Will you state your name and address to this jury, please?

A. William J. Reidenbach, 876 Poling Drive, Columbus, Ohio.

Q. And for the purpose of the record, will you spell your last name?

A. (Spelling) R-E-I-D-E-N-B-A-C-H.

Q. Now, Mr. Reidenbach, you are an attorney-at-law?

A. I am.

Q. And by whom are you employed?

A. The State of Ohio, Department of Commerce, Division of Securities.

[fol. 25] Q. In what capacity do you work for the Division of Securities?

A. Attorney Examiner.

Q. And in connection with your duties, Mr. Reidenbach, let me ask you if you had an occasion to examine the records of the Division of Securities to ascertain whether Edgar I. Shott, Jr., the Defendant in this case, was licensed by the Division of Securities of this state as a broker on or about the 28th day of September, 1960?

A. Yes, I did make such an examination.

Q. Was he licensed on that date?

A. No.

Q. Has he ever been licensed by the Division of Securities of this state?

A. No.

Mr. Prem: May I have these marked for identification.

(Thereupon the documents above referred to were marked for identification State's Exhibits Nos. 1, 2 and 3, respectively.)

Q. Now, Mr. Reidenbach, I would like to show you a paper we have marked for identification as Exhibit No. 1. Let me ask you if you had an occasion to examine the records of the Division of Securities of this state with reference to that piece of paper to ascertain whether that piece of paper, that instrument had ever been registered with your department?

A. Yes, I have made such an examination.

Q. And has that instrument been registered with your department?

A. No, it has not.

Q. Or I should say, was it so registered on the 28th day of September, 1960?

A. No.

Q. Does your department have any record of any instrument issued by the Defendant, Edgar I. Shott, ever having been registered with your department?

A. No.

Q. Mr. Reidenbach, in connection with your duties as an Attorney Examiner, I would like to now ask if, in compliance with Section 1707.30 of the Revised Code, your department prepared a certificate stating that Edgar I. Shott has not been licensed by the State of Ohio?

A. Yes.

[fol. 26] Q. And did you also have prepared or bring with you a certificate showing that the instrument I just showed you was not registered?

A. Yes.

Mr. Lloyd: If your Honor, please, for the purpose of saving time, we will agree to stipulate all of this.

Mr. Prem: I am through it now, Judge.

Q. I would like to show you State's Exhibit Nos. 2 and 3 marked for identification, and with reference to No. 2, first, will you tell the jury what that is?

A. Exhibit 2 is a certificate of the Division of Securities, which certifies that the records of the Division disclose that Edgar I. Shott, Jr., has, at no time, been issued a Security Dealer's or Security Salesman's license.

Q. And by whom is that certificate signed?

A. By the Chief of the Division.

Q. What is his name?

A. W. Patrick Green.

Q. Now, I would like to have you look at No. 3 for identification. Tell the jury what that is.

A. Exhibit 3 is a certificate of the Division, which certifies that the records of the Division show that none of the instruments issued by Edgar I. Shott, Jr. have been registered with the Division of Securities.

Mr. Prem: Your Honor, at this time the State would like to offer into evidence as exhibits, those that have been marked Nos. 2 and 3 for identification.

Mr. Lloyd: Now, I am going to object to that, your Honor. I am going to tell you why. I would like to be heard.

The Court: Objection overruled. I think I know why. Nos. 2 and 3 will be admitted.

(The documents heretofore marked for identification State's Exhibit Nos. 2 and 3, were received in evidence.)

Mr. Prem: You may cross examine.

[fol. 27] Cross examination.

By Mr. Lloyd:

Mr. Lloyd: Will you please mark these for identification.

(Thereupon the documents above referred to were marked for identification Defendant's Exhibit Nos. 4 and 5 respectively.)

By Mr. Lloyd:

Q. Now, Mr. Reidenbach, I hand you a writing marked as the Defendant's Exhibit 4. Will you identify that for me, please, if you can?

A. Exhibit 4 is a form used by the Division of Securities.

Q. Now, sir, I hand you a document denominated Defendant's Exhibit 5. Will you identify that for me, if you can?

A. Exhibit 5 is also a form used by the Division of Securities.

Q. Can you tell us, Mr. Reidenbach, for which purpose this document known as Defendant's Exhibit 5 is used?

A. Exhibit 5 is a form called Form 6—

Q. Excuse me, sir, that is wrong. I did not intend to hand you that. It is my mistake. I intended to hand you this other Exhibit 4.

A. Exhibit 4 is a form called Form 9, which is used by persons making an application to the Division to register certain securities.

Mr. Lloyd: Your Honor, we have no further cross examination of this witness.

Mr. Prem: We have no further questions.

(Witness excused.)

The Court: Are you finished? There will be no further examination of Mr. Reidenbach?

Mr. Prem: That is just what we were talking about, Judge. At this time we can't state whether we will need that witness again.

The Court: All right, then he had better leave the Court Room.

Mr. Prem: Patrick Sestito.

[fol. 28] PATRICK SESTITO, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Prem:

Q. Mr. Sestito, will you state your full name to this Court and jury?

A. Patrick Sestito.

Q. And how do you spell your last name?

A. (Spelling) S-E-S-T-I-T-O.

Q. Where do you live?

A. 5605 Abbottsford.

Q. Is that here in Cincinnati, Ohio?

A. Yes, sir.

Q. Cincinnati 13, I believe?

A. Yes, sir.

Q. What is your business or your occupation, Mr. Sestito?

A. Salesman, furniture.

Q. And where do you work?

A. Fox Furniture Company.

Q. How long have you been employed as a salesman, furniture salesman?

A. For which outfit, sir?

Q. How long have you been engaged in that business?

A. Oh, about six years.

Q. I would like to ask you if you are acquainted with the Defendant in this case, Edgar I. Shott, Jr.?

A. Yes, sir.

Q. Let me ask you if you had an occasion to see Mr. Shott on or about the 28th day of September, 1960?

A. Yes, sir, I did.

Q. What was the occasion for your seeing him on that day?

A. Well, I went there just to make a regular visit, and of course, naturally he approached me on this, you know, lending money, and of course, naturally I loaned him some money.

Q. Well, now he was—where was it you saw him on that day?

A. At his office.

Q. Where is his office located?

A. Atlas Bank Building, second floor.

Q. That is here in Cincinnati, Hamilton County, Ohio?

A. Yes, sir.

[fol. 29] Q. And what time of the day was it that you went there, if you recall?

A. Well, I would say it was about 1:30, somewhere in the afternoon.

Q. In the afternoon?

A. Yes, sir.

Q. When had you been there prior to that date?

A. Well, I mean—well, I know Mr. Shott. I stopped in several times. I mean I just couldn't say.

Q. Had you and Mr. Shott had any advance arrangements for your being there on the 28th day of September, 1960?

A. No, sir, not that I can remember.

Q. Had you telephoned to Ed?

A. No, sir.

Q. Or made any contact with him?

A. No, sir, I just dropped in.

Q. When you dropped in, was there any purpose for your dropping in on that date?

A. Well, I mean no. I mean it was just more or less a personal visit. I just dropped in to see him.

Q. Did you have any money with you?

A. Yes, sir, I had about—little over $2,000.00 with me.

Q. Now, let me ask you, Mr. Sestito, if on that date you had any conversation with Mr. Shott about the Shott Investment Company?

A. Yes, sir, we did.

Q. And what was the conversation you had?

A. Well, I mean of course, he approached me on this investment, and he told me—he asked me if I wanted to make some money. Of course, naturally, everybody wants to make money. And so I asked him a few questions about it and, of course, he told me that this money was being invested on financing buildings, and so forth.

Q. Well, had you heard or did you have any knowledge about this Shott Investment Company before you went there on that day?

A. Well, sir, I mean I have heard around. I mean, you know, there was such an investment going around.

Q. And what was it that Mr. Shott told you about the company and the investments that were being made?

[fol. 30] A. Well, I mean, of course, naturally, I asked him if I could check it out and, of course, knowing Mr. Shott I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing it in buildings and financing. I know finance companies make a lot of money. I do know that.

Q. Did he say who was investing it in buildings and financing and making a lot of money?

A. No, sir, he didn't state that.

Q. Was there any conversation had with you at that time about your participating in those investments?

A. Sir, I didn't understand that.

Q. Did he ask you for any money?

A. Yes, he did.

Q. Did he ask you for any particular amount?

A. Well, he asked me how much I could come up with and, of course, I mean I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand.

Q. What sounded so good?

A. Well, the percentage, twelve and a half per cent.

Q. What were the arrangements that were to be made?

A. Twelve and a half per cent for 60 days.

Q. Let me ask you if, in the course of your conversations about the Shott Investment Company, that you had with Mr. Shott on that day in his office, he showed you anything about the company?

A. Well, yes, he showed me, oh, I don't know what you would call it. An eight and a half by eleven stationery, plaque more or less, showing about these Shott investments.

Q. What do you mean showing about the Shott investments?

A. Of course, I couldn't read it. I couldn't remember it. It told about the company, Shott's investments.

Q. Did it have writing or figures or what did it contain?

A. Well, it just stated, you know, like—told about the company, like it's been in effect since—of course, I couldn't remember the date. I think it said something like 1955.

[fol. 31] Q. Did it say anything about the investments that were being made?

A. Well, sir, I can't remember that. I just glanced at it and didn't study it too much.

Q. After you read that, did Mr. Shott make any other explanations to you about how the company operated or what was happening to the money?

A. No. Of course, he specified to report it to the—of course, I asked him—of course, I figured it was legitimate because I mean he being a lawyer, it was straight up and down. And he says report it to the income tax. And, of course, naturally when he said that I figured it was all right.

Q. Report what to the income tax?

A. The profit.

Q. Did you invest any money on that day?

A. Yes, sir, $2,000.00.

Q. And how did that transaction take place?

A. Well, I received a note for the money. I believe it is right here.

Q. I mean did you give him that money at that time?

A. Yes, sir, I did.

Q. Was that part of the money you had in your pocket?

A. Yes, sir.

Q. Was that the reason you went to that office?

A. Well, I mean not necessarily. It was just more or less, you know, just a social call, just to stop in and say hello.

Q. And you had that money in your pocket at the time?

A. Yes, sir, I did.

Q. Now, how did you pay him the $2,000.00?

A. Well, I had a check from Irvin's Furniture, which was a large, I would say about $1,200.00, and the rest was in cash.

Q. You gave him $2,000.00, including that $1,200.00 check?

A. No, sir, the $1,200.00 check and the balance of $800.00, which made a total of $2,000.00.

Q. And the piece of paper that you received back from Mr. Shott, what amount was stated, if any, on it?

A. If I remember correctly, it was $2,250.00.

Q. Now, the $250.00 above the $2,000.00 stated on that piece of paper, what did that represent?

A. Twelve and a half per cent profit.

[fol. 32] Q. For the money that you had placed with him?

A. Yes, sir.

Q. I would like to show you a piece of paper we have marked with the No. 1 for identification, Mr. Sestito. You examine that. Have you ever seen it before?

A. Yes, sir, that's the note that he gave me.

Q. And was that the note that he gave you on September the 28th, 1960, at his office in the Atlas Bank Building of this county?

A. Yes, sir.

Q. Was that the piece of paper that you received after you paid him $2,000.00?

A. Yes, sir, it is.

Q. Did you see Mr. Shott or come into contact with Mr. Shott again after that date?

A. Well, I mean I was over in Covington about two months ago. I was just cruising by. I signaled at him but nothing else.

Q. Let me withdraw that question and restate it. I perhaps asked you in a clumsy fashion. When was the $2,250.00 to be paid to you as you understood the transaction?

A. Well, 62 days later.

Q. Well, what date?

A. Well, to be truthful with you, I couldn't remember the date. I think it was the last of November, though, somewhere in there.

Q. The last of November. And this piece of paper that was given to you that we have referred to as Exhibit No. 1 for identification, who was that signed by, or how was that signed?

A. Well, to tell you the truth, I don't know. I believe it it Mr. Shott's writing.

Q. Well, I mean was it given to you by Mr. Shott?

A. Yes, it was.

Q. And what did it say on there?

A. Shott Investment Company and his name below it.

Q. And did it indicate a date that it was due?

A. Yes, due November the 29th, 1960.

Q. Now, between September the 28th, 1960 and November the 29th, 1960, did you come into contact with Mr. Shott?

A. Yes. When it was due, I mean his secretary called me and asked me if I wanted to parlay it or—

[fol. 33] Q. Wanted to what?

A. Wanted to, you know, to parlay it.

Q. What do you mean parlay it?

A. Well, to let it ride, or, you know, or draw the profit out. Of course, I told her I wanted to, you know, draw it out.

Q. She asked you if you wanted to let it ride?

A. Yes, sir.

Q. What did you understand that to mean?

A. Well, I mean to invest it all over again.
Q. Reinvest it?
A. Yes, sir.
Q. Did you reinvest it?
A. No, I didn't.
Q. What did you do?
A. I withdrew my money.
Q. Well, did you go there to the office?
A. Yes, sir, I went there to the office and I received a check.
Q. How many checks did you receive?
A. One check for the full amount.
Q. $2,250.00?
A. Yes, sir.

Mr. Prem: Your Honor, at this time I would like to offer into evidence Exhibit No. 1.
Mr. Lloyd: No objection.

(The document heretofore marked for identification State's Exhibit No. 1, was received in evidence.)

Mr. Prem: You may cross examine.

Cross examination.

By Mr. Andrews:

Q. Let me ask you, you used some colorful language on the stand here. Now, you testified you are a furniture salesman, right?
A. Right.
Q. And you normally refer to that as hustling sticks, don't you?
A. Well, yes, that's right.
Q. And I want to be a little bit more careful now on, if you will, Pat, and use the language—

The Court: Objection sustained.
Mr. Schoettmer: I don't think we need this kind of comment.
[fol. 34] The Court: No, you don't have to instruct the witness.

Q. Pat, how long have you known Ed Shott?

A. Well, I would say since about 1953, I would say.

Q. And in the ensuing years he has represented you a couple of times, one time when you got sick after eating something, and he represented you on that. Later on you had one of your employers go bankrupt and he handled that for your employer; is that right?

A. Yes, he did.

Q. And periodically you stopped in the office and talked to Ed, and if Ed was not there, you would talk to me, right?

A. Yes.

Q. This has gone on over a long period of years, right?

A. Right.

Q. Now, going back to September [illegible]960, when this transaction took place in the office, you testified on direct that you had heard about investment opportunities or something of that nature; is that right?

A. Yes I did.

Q. Involving Leslie Stickler?

A. Well, no. I mean I didn't know about that at that time. I didn't know about that.

Q. Where did you hear it and who did you hear it from?

A. Well, I heard it, well car dealers. A couple of places mentioned, you know, about this.

Q. Where?

A. Reading Road in particular. I believe this State Motors, somebody at State Motors. But, of course, he may not have known what he was talking about, but I did hear it.

Q. You knew Ed over this long period of time and you talked to Ed quite a few times during the period of a month or a period of six months, right?

A. Oh, yes.

Q. And isn't it a fact that Ed was the one who told you that he was loaning money to Les Stickler?

A. No, he didn't say who he was loaning it to. No, I don't remember that.

Q. How did you find out he was loaning it to Les Stickler then?

A. Well, I read that in the newspapers. I mean I really didn't know.

[fol. 35] Q. You found out from the newspapers?

A. Yes. I mean when it was all—when the whole thing was up.

Q. Are you telling, do you want this jury to believe the first time you knew Ed Shott was loaning money to Stickler was when you read it in the newspapers?

A. That's right.

Q. How did you happen to loan money directly to Stickler?

A. A fellow by the name—

Mr. Schoettmer: Objection. We are not concerned with that here.

Mr. Andrews: This goes to his credibility.

Mr. Schoettmer: I will withdraw it.

A. Well, a fellow that worked up there at the furniture company, I don't know how he knew him, but he did know about it. His name was Eddie Mitchell, and of course, he mentioned the fact that Stickler investment was giving, you know, a much higher rate. So that is how come I went there.

Q. Pat, let me ask you something. Fifteen or 20 minutes ago, when we were out in the hall, didn't you tell me that you had nothing against Ed Shott, except it was through him you heard about Stickler, and through him you loaned to Stickler, and when you loaned to Stickler, you lost your money?

Mr. Schoettmer: I object.

The Court: Objection sustained. You can't impeach your own witness.

Mr. Andrews: He is not my own witness, if the Court please. I am impeaching him.

Mr. Schoettmer: We are not concerned about his personal feelings about Ed Shott, your Honor, regardless of what he told the counsel. We are after the truth what happened in this transaction.

The Court: That is all we want to know.

Q. Didn't you tell me that out in the hall about 20 minutes ago, Pat?

A. Well, actually—

Q. Just yes or no; did you tell me or didn't you?

A. Yes.

[fol. 36] Q. Actually, when you went into Mr. Shott's office on the 28th of September, Mr. Shott told you that he would like to borrow some money from you, didn't he?

A. That's right.

Q. And he told you that he would give you twelve and a half per cent interest for the use of your money for 60 or 62 days time?

A. That's right.

Q. And you trusted Ed Shott?

A. That's right.

Q. You trusted his ability to pay it back to you?

A. Yes, sir, I did.

Q. And between the two of you, you agreed to lump the principal and this twelve and a half per cent interest and show it on the face of the note as a loan of $2,250.00?

A. Right.

Q. And it was not your intention to charge, you didn't expect to receive any interest in addition to the $250.00 which was included in the principal amount in the face amount of the note, did you?

A. No, I didn't.

Q. And it was after that agreement was made between you and Ed that the loan agreement was then reduced to writing in the form of this note that is in evidence; is that right?

A. Right.

Q. He called out to his secretary and said, "Mr. Sestito and I"—"I am borrowing so much money, so make up a note for Mr. Sestito," right?

A. Right.

Q. He didn't sell you anything, did he?

A. Well, no.

Mr. Schoettmer: Counsel hasn't been sworn, has he, your Honor? He has been doing the testifying. I object to all this.

Mr. Andrews: I am leading the witness, your Honor.

The Court: As to the last part, whether he sold him anything. You did deliver—he did deliver this instrument to you didn't he?

The Witness: Well, I got the note, yes.

The Court: He delivered that to you, didn't he?

The Witness: I got it there that date.

[fol. 37] Q. Who gave it to you, Ed or his secretary?

A. Well, to be truthful, I don't remember. I believe, I will swear I don't know. There was a lot of people up there and there was a lot of confusion. I believe that he signed it. I believe he did.

Q. You aren't sure whether he signed it?

A. Really, I am not.

Q. As a matter of fact, Pat, you knew Ed all these years and you knew if you loaned him money he would pay it back to you, isn't that right?

A. Yes, I trusted him.

Q. You didn't pay any attention to how it was signed or anything else?

A. That's right.

Q. And when it was due, what happened, you got it back?

A. That's right.

Q. With interest?

A. Right.

Q. The paper that you saw, you testified to on direct examination, you said you thought that indicated Shott Investment, this partnership had been in existence since 1955; as a matter of fact, that didn't come into existence until January, 1960, isn't that correct?

Mr. Schoettmer: He doesn't know. Counsel is testifying again.

The Court: Objection sustained. When there is an objection, wait until the Court rules.

Q. Do you know the Shott Investment, this partnership, when it was created?

A. No, I really don't. That was more or less a guess.

Mr. Lloyd: Your Honor, this involves a point. We would like to have a second to confer.

Mr. Andrews: If the Court please, we will not ask this witness any more questions on cross examination at this time, with the understanding we would like to have permission to recall him on cross examination at some later time.

Mr. Schoettmer: There is no objection.

The Court: All right.

[fol. 38] Mr. Prem: I would like to ask one or two additional questions on redirect examination.

Redirect examination.

By Mr. Prem:

Q. Mr. Sestito, had you made any similar, any loan transactions with Mr. Shott like the one you just described to the jury prior to that date?

A. No, sir.

Q. Or since that date?

A. No, sir.

Q. And the $2,000.00, or little more, that you had with you the day you went down to Mr. Shott's office, where did you get the money?

A. Well, part of it was commission from Irvin's Furniture and the other, you know, I accumulated. I mean I carry that much money in my pocket.

Q. Did you get it from any loan company?

A. No, not at that time. But later on, when I invested with Stickler, I did. No loan company.

Mr. Prem: That is all. We have no additional questions.

The Court: All right.

(Witness excused.)

The Court: You say you may want to recall this witness?

Mr. Andrews: We may want to recall him later on, Judge. That is by agreement with the State.

The Court: I don't want to keep the witness sitting around longer than necessary.

Mr. Andrews: Not today. We will take care of notifying him to come back.

The Court: All right.

Mr. Schoettmer: The State rest.

The Court: The State rests.

Mr. Lloyd: If your Honor please, the Defendant has a motion to make.

The Court: Yes, all right. Take care of the jury. It is twenty after twelve. I don't want to keep the jury.

Members of the jury, the State at this point has rested [fol. 39] its case, at least for the time. Counsel wants to argue some law. I don't think we will get back to the testimony today, so I am going to excuse you and allow you to go home.

Whenever the Court permits the jury to leave the courthouse, the law says he must instruct you as follows: That you must not talk about the case to anybody, permit anybody to talk to you, or talk among yourselves. I have to tell you that each time because it is very, very important.

You probably appreciate the reason, without me explaining it, but I am going to explain it once. The reason is that you must keep your minds open and make up your minds finally after you have been instructed in the law and you go to the jury room to decide the case. Up until that time you are supposed to keep your minds open, because you are supposed to make your minds up finally when it is submitted to you after all the evidence is in.

I might also say, of course, if we talk to other people, or people talk to us, we may be influenced, even though we don't realize it. So you are not to listen to anybody or talk among yourselves. Of course, when the case is finally submitted to you, that is the reason we have 12, in your jury room you discuss it. But until that time, nothing. Likewise, if you possibly can, you must refrain from reading anything in the newspapers or listen over the radio or television about this case.

Now, that may be difficult. Something may come on before you realize it, but if accidentally that does occur, you must not let it influence you, only the evidence that the

Court permits in the court room and the law which the Court gives you after the case is ready for your decision. If anything like that occurs, or anybody tries to talk to you about the case, you must report it to the Court. It may be contempt of Court; likewise, if you violate that yourself, it is contempt of Court, and it could result in a possible mistrial. We don't want that. And because it is important, for that reason the laws says each time I permit you to from the courthouse, I must instruct you accord-
[fol. 40] ingly, so that you have no excuse for forgetting it. It is the last thing you heard. You have no excuse for forgetting it.

(Thereupon the jury was dismissed to 9:30 o'clock, a.m., Thursday, June 29, 1961.)

Mr. Lloyd: Your Honor, we anticipated that we would make a motion at the close of the State's case. You will understand that we did not anticipate that the State's case would be fully presented today. Now, I am not prepared to argue my motion. I don't even have my cases I want to refer to.

The Court: Well, I can say, if you want me to rule now, and I think I ought to, with the reservation, if you want me to, rule again tomorrow morning. At this moment, my motion is that I will overrule your motion. I think the case is made out. The State has made out the case required by them by law. This particular case and under this particular law—

Mr. Lloyd: Now, instead of saying anything in response to what you have said—

The Court: They have made out a prima facie case.

Mr. Lloyd: Let me say this to you. Instead of saying anything responsive to what your Honor said now, I will save my entire argument for tomorrow morning, if it is all right with the Court.

The Court: Well, that is all right. Then we will adjourn until 9:30 tomorrow morning.

(Thereupon an adjournment was taken to 9:30 o'clock, a.m., Thursday, June 29, 1961.)

PROCEEDINGS

Thursday, June 29, 1961.

The Court: You may proceed.

Mr. Lloyd: Your Honor, the State having rested its case, the defense, upon consideration of this matter, elects also to rests its case.

[fol. 41] Now, the defense would like to move the Court for a directed verdict at the stage of the case where the State—

The Court: It will be overruled.

Mr. Lloyd: Now, wait a minute. What I am trying to say—

The Court: It will be overruled.

Mr. Lloyd: In any event, I say the State has rested.

The Court: First you want to take up your motion for a directed verdict before you say you are not offering any evidence. I will overrule that. Apparently, your conception of this law is different than mine. The State has offered evidence on every point. There is a prima facie case. It is up to you now to proceed on an affirmative defense, if you have one. I can't instruct them—if it were a civil case—I would instruct the jury to bring in a verdict for the Plaintiff, the State. But I can't do that, as I understand the law. I must submit it to the jury.

Mr. Lloyd: I say we rest. Do you want to bring the jury in and have us say that again?

The Court: I don't have my charge fully prepared. If you want me to charge them, we will have to adjourn. If you insist on resting your case with no evidence, I am telling you the way I view the law. If I could, under the law, I would direct a verdict for the State. I can't. Isn't that correct?

Mr. Schoettmer: I think that is right, your Honor.

The Court: I will give you time to consider. If you still insist that you have rested your case, I am telling you what I will have to do. I must instruct them. It is quite a job to instruct them and not tell them to bring in a verdict.

Mr. Lloyd: Counsel has to follow its own best judgment, and I must say we have decided to rest.

The Court: If you insist on it. All right, we will adjourn until tomorrow morning at 9:30. I have a charge, but it is not in shape.

[fol. 42] Mr. Schoettmer: Tomorrow morning we will argue and have the charge to the jury? The argument should be very limited, I think.

The Court: If the State would offer part of its argument, that would save that much time.

Mr. Schoettmer: I don't think that the whole argument will take that long, your Honor. There is not that much to argue.

The Court: I don't know how long the defense wants to argue. I do want to finish it tomorrow. I would have gone on next week if necessary, but in view of the stage we are now at, I would like to finish tomorrow. I don't want to keep the jury after 1:00, but if they want to stay, all right.

Mr. Schoettmer: In total time consumed in argument, I will think the state will not take more than 45 minutes. This is a jury that has had no previous experience, and that is why we asked for an extra 15 minutes.

Mr. Lloyd: We don't want to break the continuity of the arguments and charge.

The Court: Then we will adjourn until tomorrow morning at 9:30. I will have to bring the jury in. I will still leave open your offer of testimony. This is a criminal case, and I take it very seriously, and particularly in view of this law. I want to leave the opportunity open until the last minute for you to offer evidence. So you make up your mind, and you can change it if you wish.

(Thereupon the jury was returned to open Court.)

The Court: Members of the jury, some matters of law have come up that have been submitted to the Court, so we can't go on any more today. If you will report directly and promptly to your jury room at 9:30 tomorrow morning, we will continue the case. Of course, we can't anticipate in advance just what is going to happen. That is what happened this morning, some other questions of law have

come up so that we can't go on with the evidence. So report to your jury room promptly at 9:30.

[fol. 43] Remember the caution of the Court, do not talk to anybody about the case, permit anybody to talk to you, or talk among yourselves. All right, report to your jury promptly at 9:30 tomorrow morning.

(Thereupon an adjournment was taken to 9:30 o'clock, a.m., Friday, June 30, 1961.)

PROCEEDINGS

Friday, June 30, 1961.

The Court: All right, nothing further? We are ready for the jury?

Mr. Lloyd: Yes, sir.

The Court: All right, bring in the jury.

(Thereupon the jury was returned to open Court.)

FINAL ARGUMENTS

Mr. Schoettmer: May it please the Court, counsel, ladies and gentlemen of the jury: In the procedure that we discussed at the time we were asking you questions on voir dire, I described to you that at the close of the evidence, when you would no longer hear any witnesses, that the lawyers would discuss the case with you. We call that argument. What I am going to make to you now is called the opening argument. I will be followed by defense counsel, who will make their final argument, and I will return to make the closing argument concerning the facts and the law of this case. I caution you at the outset of my remarks that anything I say, or anything defense counsel says to you, is not evidence as such, not to be considered by you as evidence, but these remarks are considered important to help you to determine the issue in this case, to understand the facts and the law as you will hear from Judge Weber. Your duty as a juror you are aware of. You have had to sit and listen to the testimony of the witnesses that you heard, to absorb that. You now must listen to the charge of the law of Ohio as to those facts. You will then go into your jury

[fol. 44] room and his Honor will tell you the first thing you will have to do is to elect one of your number as foreman to preside over the deliberations. You will vote, and after you have discussion, if you need a discussion, to determine the issue of guilt or innocence.

Being a criminal case, his Honor will tell you all 12 must agree on the verdict before you can return it. You took an oath and you promised that you would, under the law, render a verdict without fear or favor, passion or prejudice; that you would use your minds in reaching a decision.

This case comes here on an indictment. This is an indictment, a piece of paper, a formal charge of what the State claims this Defendant has done. This is a copy of it. You will have the original in the jury room with you. It sets forth in detail the two different crimes that the State charges that Edgar I. Shott committed. You will find, when you read the original, that there are two counts to the indictment.

The first count says that Edgar I. Shott, Jr., on or about the 28th of September, in the year 1960, did unlawfully sell, cause to be sold, offer for sale, cause to be offered for sale to Patrick Sestito a security, to-wit: A written instrument evidencing a promise to pay money, which the said Edgar I. Schott, Jr., hereinbefore mentioned, was not then and there licensed to sell securities in accordance with the provisions of the Ohio law, and that this is contrary to the form of the statute and against the peace and dignity of the State of Ohio.

In substance, then, Edgar I. Shott is charged with not having been licensed by the State of Ohio before he sold this security.

In the second count it says that this same Edgar I. Shott, when he sold it, had not previously registered the security with the State of Ohio.

You have been told, and it is the law, that this Defendant, as we open trial, is innocent until he is proven guilty by [fol. 45] the State of Ohio. When the evidence comes in, however, as to the elements of the charge, that cloak of innocence is ripped from him. The elements that you must find as to whether or not the State of Ohio proved them

will be told to you by Judge Weber in the charge, and among other things, he will say that the State had a duty to prove that this transaction happened in Hamilton County and in the State of Ohio.

Now, there is no issue on that. This happened in the Atlas Bank Building on Walnut Street in Cincinnati. That is in Hamilton County, and that is in the State of Ohio. Don't concern yourselves with that. That is proven.

The date; when did it happen? We have to prove that. That happened, obviously, as the date of the note, on September 28th of 1960. We have to show that this man Edgar I. Shott is the one who did it. There is no doubt about that. We have to show that Patrick Sestito is the one who obtained this security. We have done that. The State of Ohio must show that the Defendant sold or disposed of the security. Obviously, he delivered it and dispensed with it to Patrick Sestito. We have to show that this is a security, and the Court will define to you what a security is under the law of Ohio, and I am confident the Court will tell you that the statute of Ohio defines this piece of paper as a security. Money had to be given for this security, and you heard Sestito tell you he gave $2,000.00, for which he received $2,250.00 subsequently, the $250.00 being his profits in the venture. And in the first count we further have to show, and we believe have shown, that the Defendant was not licensed by the State of Ohio to sell this security.

So you see, my friends, the issues here are very simple, as one of counsel told you earlier. It's merely a question of, did this transaction occur, and was Edgar I. Shott licensed to transact it? From what you have heard, and you have heard everything there is to be said in this particular case, it is apparent that he did sell a security, and that he was [fol. 46] not licensed to do so. Not having been licensed, he has breached the law.

Now, the second count, the elements are very similar. The only question that remains different from the first count is, was this security registered with the State of Ohio prior to its sale? Obviously, it was not. Not only

do these certificates show that they were not registered, or it was not registered, but Defendant's counsel himself, in his statement to you, admits that it is not registered. So there is no issue there.

So why are you here? What is there for you to decide? Well, the only thing you have to decide and realize is that any Defendant, anywhere, at any time, charged with a crime, has a right to a jury trial. The constitution gives him that right. He goes to a jury trial in order to get the jury to come into his favor and into his corner, through sympathy to let him go, to induce you to let him go, however much the facts and the law might be against him.

What is this security law? Well, it's been called the Blue Sky Law, and that was its title for many years. We now like to call it the Securities Law. It has a two-fold purpose. One purpose is to regulate the sale of securities, so that there will be orderly flow in the economic business of this state, to set forth how and when and where and under what conditions citizens may purchase securities. In order to sell securities under the Act, there must be a license.

Now, you are not to question whether the state has a right to order a person to have a license before he sells securities. You just must know that the state does order it, the same as it orders you to get a drivers license, or a fishing license. The state has the power to order it, and it has so ordered under the Securities Law.

Now, the second purpose of the Securities Law is to prevent and guard against speculative schemes. The idea of the law is to protect, as much as possible, the citizens of this state from speculative schemes, and that is why [fol. 47] the legislature, in its wisdom many years ago, set up this Security Law and, first of all, defined security, said what it was, what people can deal in and what they cannot. A part of that definition is, that a promissory note is, without question, a security, the same as a share of stock or a bond. All of those are securities says the legislature. That is the law, and that is what Judge Weber will tell you.

The legislature further went on to say that no person may sell a security unless that person is first licensed or the security is first registered with the state.

Now, in this case was this security registered? No, it was not. Was Edgar I. Shott licensed to sell it, this one or any other? No, he was not. It is apparent, therefore, that Edgar I. Shott has breached the law in both of these counts. He has not complied with the Security Law of Ohio.

Now, I want to tell you further, Judge Weber will tell you, too, that it is the law of Ohio that it is possible, upon compliance with the law, that a promissory note, at any one time under any certain transaction, might be considered exempt. Exempt from these laws. In other words, an exempt security, and in being an exempt security, it need not be registered, and the seller thereof need not be licensed. I suggest to you, when you signed the note, the promissory note when you bought your house, and you signed a mortgage at the building and loan and then bought your house, that was a security that you signed, that promissory note, but that note, my friends, in that instance, in that transaction of borrowing from the building and loan, was a private transaction, and under this exemption need not be registered; and, therefore, you did not commit a crime.

Let me go on further with exemption as such. This exemption holds only under certain circumstances. It does not apply to all promissory notes. It applies only when it fits this exemption as set forth by the legislature under the law.

[fol. 48] The law says further that in a certain case, in this case, in order to take advantage of the exemption, in order to show that the exemption does apply, it is the duty of the Defendant to present evidence to you to show that it's exempt. He must, and I think Judge Weber will tell you this is the law, he must show to you by evidence to the amount that it is by a preponderance of the evidence that this transaction, this security, is exempt. It's his duty. If he fails in that duty, if he does not present evidence to you by a preponderance of the evidence, then the exemption is

not permitted him, or this promissory note does not fit under the exemption, and does fit under the regular security law, and it must be registered, or the one dispensing it must be licensed.

In this case what evidence has been presented by the Defendant to show you by a preponderance of the evidence that this is an exempt security? The answer is none. You didn't hear one word from any witness at any time concerning this security to make it fit into the exempt securities statutes.

Patrick Sestito, when he testified to you, said he went down to the office of Edgar I. Shott because he had heard it out on Reading Road about the investment company that Edgar I. Shott was running. He went to his office with $2,000.00 in his pocket. He only intended to invest $1,000.00, but he wanted a piece of the profits that he heard Edgar I. Shott was paying, and that is why he went there, and that in talking to Shott about the investment company and how it was growing and what a good return he was getting, he decided it was a good deal, so he put in $2,000.00 so he could make a better profit or a greater profit. You deal with an investment company for investment. This, obviously, was not a private loan that Patrick Sestito made to Edgar I. Shott. This is not some favor that Sestito is granting Shott to loan him money. In my dealings, and I am sure with yours, when you want to borrow some money, you go [fol. 49] to a place to borrow it. The lender doesn't come to you and say, "Please let me loan you some money."

Now, in this case was Sestito putting the money up with Shott to make a profit? Or was he, do you think, making a personal loan to Shott? What did Sestito hear out on Reading Road from the car dealers, that Edgar Shott wanted personal loans, or did he hear about the term investment? My friends, do not think for one minute that this can be twisted from what it is to the approach that the Defendant would like it to be of a personal loan. This is investment, pure and simple, by a fellow who wants to make money.

Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, "You can't get me; you can't convict me." That is what he said.

Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, "Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal." Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you, "Members of the jury, what I did was proper?" He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? Because it's illegal today, and it was illegal in September of 1960.

[fol. 50] Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security, was sold by Ed Shott? You have heard evidence of one—

Mr. Lloyd: I will object to that, your Honor.

The Court: Objection overruled.

Mr. Schoettmer: You have heard evidence of Pat Sestito. We can only try one case at a time because each case is a separate and distinct crime, but you have heard from his counsel on opening statement, his own counsel, this man Lloyd told you that the reason the word "Investment Company," Shott Investment Company, appears on that note is because Shott was making so much money he had to set up an investment company to get his income taxes lowered. Is $250.00 all he made? No. You don't set up investment companies to lower your income taxes on just $250.00.

You heard Sestito tell you that out on Reading Road, at the car dealers, people are talking about the investment that Edgar I. Shott is running. The public, those in the know, are aware of this investment company, and when Sestito becomes aware, he wants a piece of the profits, and then we had the transaction. You can believe, in the light of this investment company, there were many and numerous transactions of this same type; that this is just one sale of many, and don't you consider for a minute that a single sale is therefore private. A single sale at a broker's office is one sale. But there can be no question there are many sales at that broker's office, dealing with the public as it must, under a license, of course. But one sale, when you buy a pair of socks in a department store, that is one sale. Now, how many more sales were made in that department store? A single sale does not make it a private transaction, ladies and gentlemen.

What does the state set up in order to keep the regulation of the securities in our commerce flow? The state has set up the Division of Securities. It's a group of men, [fol. 51] skilled, trained, educated in securities. Their job is to be the overseer of the securities that are transacted in the State of Ohio. Their job is to see that all securities are fair; that they are open; that everyone can know about them. Before they will issue a license to a man to sell securities, they will look into his background; they will see his economic stability; they will concern themselves with his character in the neighborhood and in business dealings, and then they will advertise in the newspaper as to whether or not anyone in the public has anything against this man to show that he should not be licensed. That's how careful the Division of Securities are before they issue a license.

And a security itself, when it's registered or attempted to be registered with the Division, is scrutinized by the Division to determine the economic backing of the security. Is it worthwhile or is it a scheme? To determine how many issues can be granted in fairness to the public. In other words, the Division of Securities puts a spotlight, both on the man to sell them and on the instrument to be sold, so

that that spotlight of publicity can be known to all, and no scheme that does not have adequate assets behind it can be foisted upon the public. That is the reason we have the Division of Securities.

I suggest to you, ladies and gentlemen, that when Edgar I. Shott was dealing in these securities, he well knew that those securities, this one for example, he knew that this security, if submitted to the Division of Securities, could not withstand that spotlight of publicity. He knew it could not be registered, it would not be accepted, and that if he attempted to register it, he would be turned down. He further knew that this security could not be exempted because of the type of scheme with which it is involved. He further knew that he could not stand the spotlight of the Division to obtain a license to sell that security.

In like manner, my friends, we say to you that Edgar I. Shott, as he sits there in that chair, and has for three days, [fol. 52] cannot stand the glare and the publicity and the spotlight that you put upon him looking into his activities. He doesn't dare take that stand and tell you about his transactions and dealings. For just one reason; because what he has done is illegal under the law of Ohio, and we suggest to you that under your oaths, under your realization of the facts, and under the law, you have no choice but to find this man guilty of both the first count and the second count in this indictment as he stands charged.

Mr. Lloyd: If your Honor please, Mr. Prosecutor, members of the jury: As I begin the argument for the defense in this case, entitled the State of Ohio against Edgar I. Shott, I am obliged to say to you that this is the most difficult assignment that I have ever undertaken in my limited professional life. Lawyers who are in general practice are confronted with a variety of different channels. Some of these cases involve great issues in the shaping of the law. Some of them involve issues of human values and arouse deep concern for people and their families and their future.

This case is unique because it is a case which, in my judgment, involves both great questions of law and public policy, and it's a great case because the outcome is related to the

liberty and the professional career and the hopes and the dreams and the aspirations of a fellow lawyer and a close personal friend and his family and his associates. It is because of my deep concern for both of these issues that I aid Mr. Andrews in the defense of Ed Shott. Mr. Andrews needs no aid; in fact, Mr. Shott needs no defense. But enough of the private things which are in my mind and heart. I am anxious to get to the real issues in this case.

Now, the prosecuting attorney had a good deal to say in his forceful and eloquent way. Rather than respond specifically at this point to every one of the statements made by Mr. Schoettmer, and I might say to you that he, let us say, took considerable liberty with the evidence. He was en- [fol. 53] gaged in what we might call projecting or extrapolating upon the few simple things that have been said here in this case. Rather than deal with what he said now, let me tell you the way in which we react to this case. I will get to the specific points he made as they fit into the theme of what I am about to say to you.

Now, I would like to meet head-on his allegation that the Defendant did not take the stand in this case and that he is indicating his guilt because he is not taking the stand. I will tell you why the Defendant did not take the stand in this case. Because I refused to let him take the stand because, in a criminal case, and this is something that I have known long before I went to law school, members of the jury, in the United States of America no man is under an obligation to prove he is not guilty of a crime. In a criminal case in Cincinnati, Hamilton County, United States of America, the state has the burden of proving the Defendant guilty beyond a reasonable doubt, and neither Edgar I. Shott, nor any other man charged with a crime in the Anglo-American system of justice, has any obligation to take the stand, and I can't think of a better time or place to put that principal of law into operation than right here and now.

In the second place, we said to you in our opening statement exactly what the evidence would show. We said it would show he didn't resgister any security; we said it would show he didn't have a license to sell securities; we

said it would show he entered into a simple loan transaction with Pat Sestito, and that, I suppose, is what the evidence showed. I don't think the evidence showed quite as much or quite as lucidly as in our opening statement we said it would show. But at any rate, we can add nothing to it, and there was no reason, under the circumstances, to burden you with any more testimony in order to prove what we said would be proved, either by the State of Ohio, or by this Defendant.

[fol. 54] We said, furthermore, that when the evidence was all in, it would show that Ed Shott was not guilty of a crime. So I guess this is the way to say it. We began this case at point zero. When the State had put on its evidence, it was still at point zero. There wasn't anything to counteract; there wasn't anything to overcome; and this is where we still are, point zero, no case against this Defendant, Ed Shott.

Now, you heard this case. I think it's a rather pathetic case. It's just simply to this effect; that Ed Shott borrowed $2,000.00 from Pat Sestito and paid him back $2,250.00, as he had agreed to, and Pat Sestito made $250.00 as a result of this transaction; and as the result of all this, Mr. Schoettmer and Mr. Prem are asking you to find Ed Shott guilty of a felony and subject him to a sentence in the penitentiary, and to otherwise ruin his life. That is the State's case.

Now, I believe that this a shameful case, and it's a tragic case, and at the same time it is a frightening case. I say that it is shameful because this non-sensical recitation of events, symptomatic of those things which transpired in our daily lives, this non-sensical, meaningless recitation of simple human transactions with which you are being burdened is not Mr. Schoettmer's case, it isn't Mr. Prem's case, it isn't the prosecuting attorney, Mr. Hover's case, no. It's the State of Ohio case; the great State of Ohio has labored mightily and has produced this miserable mouse. I say to you that I am ashamed of the State of Ohio. I would think that any Ohioan would be ashamed of it for bringing a criminal case like this into a Court of Law. That, I say, not

only is shameful, I think furthermore it's tragic. It's tragic because, unless you assert the good judgment to prevent it, and only you can prevent it, and thank God for you, thank God for you, because up to now this Defendant, in all his energies, had no source of protection against the design of [fol. 55] the prosecuting attorney, but unless you have the good judgment to prevent it, an innocent man will be ruined for life.

Now, it might be that this nice issue, whether such a transaction might properly be deemed under certain circumstances to be the sale of a security under the Ohio Securities Law, might properly be adjudicated for someone's amusement before some moot court, before the practice court at the law school of the University of Cincinnati; but I think it is tragic to bring this kind of an issue of law into a criminal court and jeopardize the career and the reputation and the liberty of a valuable human being.

I say furthermore, members of the jury, this is not only shameful and tragic, it's frightening. It frightens me, as it might indeed frighten you, and it causes cold chills to run up and down my spine when I think that, if Ed Shott can be tried and convicted for borrowing money from Pat Sestito, all of us who borrow money from our friends can be tried and found guilty of a felony. If we live in a community in which the ordinary experiences of our daily lives, carried on honestly and successfully and in good faith, will render us susceptible to criminal prosecution, then who among us in safe? Who among us is safe from indictment and trial?

You borrow money from a friend of yours and you give him a note, and many of us have done it and some of us have had to borrow more times than others, you know what that kind of a transaction is. In that kind of a transaction, and notwithstanding all of the extrapolating done by Mr. Schoettmer, that is all that was involved in this case, and that is all the evidence shows, and all you can consider is the evidence, not the meanderings of the prosecuting attorney, but what he thinks may have happened at some other time or place, all the evidence in this case shows

is that Ed Shott borrowed money from a friend and paid it back, and this is the thing that all of us have done. This [fol. 56] is the thing that all of us do, and all of us will do in the course of our lives, and this cannot be deemed to be the sale of a security.

Now, let's analyze the State's case objectively. In so doing, remember that you, and you alone, are the triers of the fact, and Judge Weber will charge you that you are the sole judge of the facts and you should not gather the impression that the Judge has any opinion in this case as to the guilt or innocence of the Defendant. The Judge has no authority to indicate by words or acts any opinion of what the facts are, what facts are true and what facts are false. He will charge you, as we talk to you about the demeanor, in a criminal case a Defendant is presumed to be innocent; that the cloak of innocence remains with him until and unless, the key word here is "unless", because it isn't inevitable that in every criminal case that at some stage of the trial the cloak is removed from the Defendant. The key word is "unless", unless that presumption of innocence is overcome by proof beyond a reasonable doubt. And Judge Weber will charge you the State of Ohio must prove every essential element of its case beyond a reasonable doubt.

Now, what are the big elements here in this case? We told you the Defendant hadn't a license and he didn't register a security. First of all, the State must prove that the Defendant sold a security. All they proved was he made a simple loan. I suppose the great source of trouble in this case are the precise words of the statute to the effect that under certain circumstances—now this is a critical point, members of the jury—under certain circumstances you can have a real, honest-to-God security in the sense that we all understand them and the legislature intended security, though you may only have a simple promissory note in form.

As a matter of fact, when we analyze the evidence in this case, when we analyze the testimony of Pat Sestito, particularly on cross examination, we find overwhelming [fol. 57] persuasion that the nub of this, the crux of it, the hypothesis of it, was a mere loan transaction. He was not

in, any sense, concerned with the written evidence of Mr. Shott's promise to pay back the loan, because he knew Ed Shott and he trusted Ed Schott, and he didn't care about the note.

Let's see what he said. Let's prove that. The note was completely incidental. This is the cross examination of Mr. Sestito.

> "The Witness: Well, I got the note, yes.
> "The Court: He delivered that to you, didn't he?
> "The Witness: I got it there that day.
>
> "Q. Who gave it to you, Ed or his secretary? A. Well, to be truthful, I don't remember. I believe—I would swear, I don't know. There was a lot of people up there, and there was a lot of confusion. I believe that he signed it. I believe he did.
> "Q. You aren't sure whether he signed it? A. Really, I am not.
> "Q. As a matter of fact, Pat, you knew Ed all these years and you knew if you loaned him the money, he would pay it back to you; isn't that right? A. Yes, I trusted him.
> "Q. You didn't pay any attention to how it was signed or anything else? A. That's right.
> "Q. And when it was due what happened, you got it back? A. That's right. With interest, right."

Now, what does that indicate? This does not indicate that even, if we can believe that the law of Ohio means that every time somebody says, "Here, let's make a note, let's make a transaction. Here is a note, I will sell it to you," even if that is what the law reads, this evidence indicates this is not what went on here. This evidence indicates that two friends had a conversation about making a loan; and whether that loan agreement was ever put in writing was utterly immaterial to the parties to this loan transaction.

How in the name of Heaven you can consider written instruments of that debt and that transaction between Ed [fol. 58] Shott and Pat Sestito to be a security, whether the

man who in fact loaned the money was not even concerned about the instrument himself, and cannot say he ever received it or under what circumstances, how in the name of sense, how in the name of law, how in the name of Heaven, how in the name of justice anyone could ever conclude that miserable thing that came into evidence was a security under the Blue Sky Law of Ohio, I can not, in my fondest, farthest imagination suggest.

The basic thing here is a simple, oral agreement to loan and borrow money. And I submit to you, members of the jury, and this is the sole of the case of the Defendant, you can stretch and strain and pull and tug and torture the words of a statute until it cries out in pain, but you do not convert a loan into a sale. You cannot convert a simple written instrument into a security any more than you can convert a cat into a dog, or a cow into a horse, because basically, in all good sense, these are different kinds of animals. That's why Ed Shott isn't guilty; that's why he didn't get a license to sell securities; that's why he didn't register anything with the Division of Securities; because he has the good sense to know that this is not a transaction in securities, and I believe that you have the good sense to know that also.

Unfortunately, I have some more things to say. Perhaps we talk too much. The prosecuting attorney will make another speech, so I have to get this all said. Perhaps I have had this to say ever since I was first retained and got into this case and began to investigate it. Perhaps this has been on my mind for some time.

You know, if the prosecuting attorney wants to make the kind of conduct in which Ed Shott engaged, which made a profit for his friend, if the prosecuting attorney wants to make that unlawful, then his recourse and his remedy is to go to Columbus to the General Assembly and ask them to prohibit that. It isn't unlawful under the existing law. That is a simple thing for him to do. And I have some idea what [fol. 59] they will say to him if he tried. You can't legislate out of business the right of a man to make a loan transaction with a friend. You can't make him get a license in order

to borrow two thousand bucks. We don't have the wisdom and we don't have the time and the money and the apparatus of government if we had the inclination to regulate every aspect of human affairs; and we don't have the reason to regulate it where no one was hurt, where nothing is in the picture but good faith. There isn't even a reason why the legislature ought to consider making this illegal, even if the prosecuting attorney did the only right thing and asked them to make it illegal. There is no reason in law or policy or common sense anybody should believe this was a crime or violation of any law, civil or criminal.

Now, the final aspect of this, as far as the legal aspect of this case is concerned, Judge Weber will charge you that in no event can you find the Defendant guilty of selling a security unless you find that he offered it for sale to the public. That is, he made it available for the participation of or by a person.

Now, my discussion of this point in the case should not lead you to believe we have any doubt whatever that when we discussed with you whether or not this is the sale of a security, the case is over and ought to be disposed of. We believe that. But this is a further aspect of this case, and we cannot conclude our argument without discussing it with you. In other words, even if this be deemed to be the sale of a security, still the Defendant cannot be deemed to have violated the law unless this was a sale which was made on a public basis, because if it was not a public sale, then in any event, it is exempt and the Defendant has to be considered under no duty to register the securities or to get a license from the Division of Securities.

Now, this is interesting, because the prosecuting attorney made a great deal of the fact that we had the burden of proving the non-public character of this transaction. I don't [fol. 60] know how you prove the negative of anything. I couldn't prove anything that Mr. Andrews didn't do yesterday. But we are not concerned with that. Of course, that is just an aside.

The proof of the non-public character of this transaction you heard from the witness stand when Mr. Prem examined

Mr. Sestito, and Mr. Sestito told this Court and jury that he and Ed Shott were old friends; that he had known him since 1953, and he told you how he happened to go to the office. He dropped into the office. Ed Shott asked him if he would like to loan him some money, and he said he would.

On direct examination of Mr. Sestito:

> "Q. When you dropped in, was there any purpose for your dropping in on that date? A. Well, I mean, no. I mean it was just more or less a personal visit. I just dropped in to see him."

And do you remember the conversation about how long they had been friends? Now, apparently, Mr. Schoettmer attaches some significance to the remarks which Mr. Sestito made on the stand about hearing something up on Reading Road about some kind of an investment. Now, I don't know what he meant, and it is not clear from the record what he meant. And I am sure he doesn't know what he meant, and I don't know how any of us can possibly tell when he meant. He said something about some used car lots, and then his testimony kind of faded off, and that is all there was to it.

> "Q. Well, had you heard or did you have any knowledge about this Shott Investment Company before you went there on that day? A. Well, sir, I mean I have heard around. I mean, you know, there was such an investment going around."

Now, isn't that a wonderful piece of evidence on which to base an allegation that this Defendant was engaged in the sale of securities to the public? Isn't that miserable? [fol. 61] When this carries with it the penalty of imprisonment, to ruin this man for life on that evidence? Can you understand now why I am indignant and perhaps professionally and tragically indignant as I argue this case to you?

Then on cross examination, the conclusive fact that this transaction was not in any sense a public transaction but a private transaction between friends was nailed down fur-

ther by the defense on the cross examination of Pat Sestito. Let me read that to you.

> "Q. Pat, how long have you known Ed Shott? A. Well, I would say since about 1953, I would say.
>
> "Q. And in the ensuing years he has represented you a couple of times. One time when you got sick after eating something, he represented you on that. Later on you had one of your employers go bankrupt and he handled that for your employer; is that right? A. Yes, he did.
>
> "Q. And periodically you stopped in the office and talked to Ed, and if Ed was not there, you talked to me, right? A. Yes.
>
> "Q. This has gone on over a long period of years, right? A. Right."

So what I am saying to you is that, if you cannot consider for any reason that the prosecuting attorney, in the direct examination of Sestito, has demonstrated beyond all possible doubt, affirmatively demonstrated, that this was not a public sale or offer, then you surely must consider that, upon the cross examination of Pat Sestito, the defense, if it had any burden, has assumed and met and sustained that burden, and through the cross examination of Sestito proved, not merely by a preponderance of the evidence, but beyond a reasonable doubt, beyond all possible doubt, that this was not a public sale or transaction, and there is nothing, my friends, that the prosecuting attorney can say to you in his closing argument arising out of the evidence in this case, and Judge Weber will instruct you to restrict your decision to the evidence and the law in this case, there is nothing the prosecuting attorney can say to [fol. 62] you in his closing argument, except that there is no evidence in this case that this was a public offering or sale.

He cannot even say to you, except the evidence showed, not Mr. Schoettmer's imagination or his extrapolations or projections, not what he thinks or guesses about, the evidence, which is the critical thing here, which is so abjectly and utterly insufficient I wouldn't put my client on the

stand, there is nothing he can say, except the evidence shows there was no public offering in any sense, and that is just that simple.

Now, in summing up, and I know you are glad I am going to sum up, I can tell you I am, you always are afraid you either have said too much or you have said not enough, and it is almost impossible to quit exactly at the right time. What are the real facts here? Where is the evil? Where is the evil which would be the basis for finding anyone guilty of a crime? Where is the criminal intention? Where is the harm or injury or loss?

Find it for me. Find it some place in this case. Find it in the evidence. The evidence, not the arguments of the prosecuting attorney. Find it in the evidence. Find the reason, find the rhyme and reason and sense for finding this man guilty of a crime.

Ed Shott is an honorable man. I have known him for many years. He is fair and he is kind and he is generous. He is hard working and successful, but a man of goodwill, a man of good faith. I would like to say to you that I am proud to represent him and proud to call him my friend, and he was Pat Sestito's friend, and still is. And yet the prosecuting attorney asks you to find him guilty of a felony, to take away his civil rights, to destroy his reputation, to obliterate his professional career, to drag him and his loved ones down through the stinking mire of public disgrace. All this in the name of criminal justice in the great State of Ohio. All this is to be done pursuant to some weird and offbeat and unnatural and grotesquely dis-
[fol. 63] figured misapplication of a law designed to regulate and police the sale of securities as you and I understand the sale of securities, and I am sure we understand the sale of securities.

Why? Why all this? Why the case against Ed Shott? I candidly submit to you that, in all of the professional integrity which I prize, I am utterly and completely unable to say, and I would rather not guess.

Now, I could, or at least some lawyers could, convince you by the use merely of dispassionate legal analysis to

find Ed Shott not guilty. But I am frank to say, and I don't think I need to say it at this point, I think I have indicated from the beginning I am outraged at this case. I am outraged as a friend; I am outraged as a lawyer; I am outraged as a citizen; and I cannot conclude my remarks without making one more poor effort to convey to you the overriding concern which I attach to this case. My concern is simply this, members of the jury. In a sense you have a larger responsibility than does the customary jury. I mean that. Yours is a responsibility, not alone to see that an innocent man is not unjustly convicted, yours is a responsibility to law and order itself as well. Yours is the responsibility to see that a law is not perverted and misused, because justice itself is entrusted to your hands and your hands alone.

If this agreement to repay a loan can become a security; if this simple loan of money can become a sale; if Pat Sestito, a friend of long standing, can become a stranger; if this honorable man, who dealt with his friend in good faith, can be stamped a convicted felon, then laws have been transformed into wicked instrumentalities for the ruination of human lives. Right has become wrong; reason and fair play and justice, which underlie our system of law and order, have been turned upside down, and we have no alternative but to adjust our living to a fearsome new value which has replaced the lessons of the ages.

[fol. 64] The Court: Maybe the jury would like to have a recess at this time.

(Short recess.)

Mr. Schoettmer: May it please the Court, counsel, ladies and gentlemen of the jury: Defense counsel, in his erudite fashion, wound up his argument at the same place he started, and that was on his personal feelings for Mr. Shott. He told you about the emotions that you should stir up in your heart for this man Mr. Shott. You should stir up your emotions to cloud your thinking, lest you injure him in his career, lest you injure his family, lest you interfere with his functioning as a lawyer.

That's the reason you should make a decision. You, who have given this man a monopoly on the practice of law; you, as citizens of Ohio, have said to him: "Ed Shott, we give you a certificate to practice law. Treat it as a profession, stand above all chicanery, be above crime. You, and only you, Mr. Shott, and your other fellow lawyers, can practice law."

Don't you think that a man who has that certificate from the Supreme Court owes a greater duty to the public to not practice chicanery, to not break the laws? Do not stir up your emotions on behalf of this man. Counsel said that his opening statement came out better than the testimony; that he admitted more things in opening statement than was produced in testimony. My only answer to that is, then counsel why did not your client plead guilty? And the reason he didn't want to plead guilty is that he is hoping that you, through arousal of your emotions by counsel, will not do your job that you have taken an oath to do; that you will not find this man guilty. He hopes that you will be so induced that you will evade your role in our judicial system. And it's confusing, counsel's argument.

He says to you on the one hand that this is a felony, this is an important, serious crime in Ohio, and yet on the other hand this violation of the Securities Law is nothing. [fol. 65] This is some small burp that the elephant casts forth, as though it's below anything that we might observe or take surveillance of.

Now, which is so? Is it important as a felony, or is it a nothing? And so the thread of confusion is attempted to be woven in his argument by counsel.

Some more emotion he threw at you was that it was frightening. You should be frightened, and I should be frightened, because the law of Ohio and the Division of Securities says we want to see every security before it is sold. We want to know who is selling them, and we want to give a license to them before they have got a right to sell them. If you are on the up-and-up, if you are legal, should you be frightened? Well, of course, not. If you know how to drive your automobile, you are not frightened because you have got to get a drivers license. And the same with securities.

The sole defense, as far as reasoning for you to think about that counsel has tried to show you is that this was not a sale to the public. This was a private transaction and therefore exempt. First of all, I want to say to you that, as to a promissory note, that a promissory note, in and of itself, is a security as defined by law, and Judge Weber will tell you that specifically. He will tell you further that, regardless of the form of the security—now this form is a promissory note—that regardless of the form of the security, if it is an interest in profits or the assets or the capital of any person or fund, and a person pays money to buy that security in order to get profits, that it is a security and cannot be considered exempt.

Do we have that factual circumstance here? Did Sestito go to Shott's office, pay him $2,000.00 to make a profit? Did he do that? Well, he says he did. Mr. Prem asked him this question:

> "And what was it that Mr. Shott told you about the company and the investments that were being made? [fol. 66] A. Well, I mean, of course, naturally, I asked him if I could check it out and, of course, knowing Mr. Shott, I figured, you know, it would be, you know, a pretty sound investment when he mentioned, you know, like investing in buildings and financing. I know finance companies make a lot of money. I know that."

Is he talking about investing? Is he talking about making a profit? He goes on further to say:

"Did he ask you for any money?"

The answer was: "Yes, he did."

"Well, did he ask you for any particular amount?"

And his answer was: "Well, he asked me how much I could come up with."

When you are making a personal loan from one guy to another, does the borrower say, "How much can you come up with?"

Then he says: "I mean, I told him I thought I could come up with a thousand, and then it sounded so good, I mean I come up with two thousand."

"What sounded so good?"

"Well, the percentage, twelve and a half per cent."

And he goes on further about seeing this brochure that Shott had made up about the Shott Investment Company, not a personal loan, not an individual transaction, but a brochure for the Shott Investment Company, to show how great it was doing over these three years.

There can be no question that Sestito was there to make a profit. In making that profit and buying this security, the exempt transaction does not fit. It does not apply. The exempt transaction that Mr. Lloyd was talking about is when, in the form of the promissory not, there is a private, personal borrowing transaction.

Now, if you find that this occurred; that Sestito wanted a profit, throw out any consideration of exempt security, because it doesn't apply. But suppose you come to the [fol. 67] point of saying, "Well, maybe it was a personal loan. Now, does it apply?" And the question is, was this a sale of this promissory note, sold directly or indirectly to the public?

Sestito is one of the public. The evidence you have is that he first heard about the transaction on Reading Road. Then he got his money together to invest before he went to Shott's office, and that he did invest the money with Shott. Under cross examination by counsel of Sestito, he said:

"I never heard of Stickler until the newspapers broke the story." That was all Shott, as far as Sestito was concerned, and Shott Investment Company.

Now, I suggest to you that a single sales does not mean it's a private sale. A single sale can very well be interpreted to be just one of a number of public sales. Now, you take into consideration all the circumstances to determine whether or not there was just one sale or were there more than one sale. And the first question that pops in your mind, "Why would Shott set up an investment company for just one sale?" And if there is more than one sale, then it is sold to the public.

How could you have proof, how could you learn whether or not there was more than one sale? You could learn it

only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, "Ladies and gentlemen of the jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito." He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify. You take it yourself. You are charged with a crime and you don't do it. What you did you thought was legal, completely legal all the way, there was no problem, no hesitation in your mind, but that it was legal.

Could any lawyer, any lawyer in this world, any Clarence Darrow, any Leibowitz, any Fallon, any Geisler, any lawyer [fol. 68] will tell you to sit there, that you can't get up and tell this jury what is the truth? You would not; I would not. If the State of Ohio puts me in that chair and says I committed a crime that I didn't commit, you can bet your bottom dollar that I will be on that witness stand staring you in the eye and telling you I didn't do it.

And there he sits. For just one reason, because he can't look you in the eye. He can't tell you that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed.

Now, we are not trying sin here, and we are not trying evil. We are trying this man, Edgar I. Shott, on two counts; that he dealt in securities as a salesman or as a dealer without being licensed; and, secondly, that this security that he sold was not registered.

This is important in our economic way of life to keep it flowing well in Ohio, so that we don't have all the contemptible schemes of milking the public come into existence in this state. This we cannot afford. And so we stop now. To this lawyer we say, "You have knowingly, voluntarily, intentionally, sold these securities, knowing them, in the first instance to be illegal, and refusing to comply with

the law in the sale of them for your own personal gain. You took the risk in order to make the money. You breached the law. You, therefore, have the duty to face up to the law."

Now is the time of reckoning, and the reckoning is in your hands. You have no choice, under the facts, in my opinion. This case could just very well have been a plea of guilty had the Defendant been of such a mind, but in lieu of that, you have to place the guilty verdict. That is your role. You have taken the oath to well and truly try this case under the facts and under the law.

Judge Weber will now give you the law, and you must follow that as he tells you is the law of Ohio. When you retire to your jury room and elect a foreman and take your [fol. 69] vote, I am convinced and confident that vote will be only one; that this man, Edgar I. Shott, Jr., is guilty of Count No. 1 and Count No. 2 of the indictment as he stands charged.

Court's Charge

The Court: Members of the Jury, after all the evidence has been presented and the attorneys have finished their arguments, it is the duty of the Court to instruct you as to the disputed facts in the case and the rules of law which you must apply to those facts in reaching your verdict.

In this case, the Grand Jury of Hamilton County, Ohio, returned an indictment in which they charge the Defendant, Edgar I. Shott, with a violation of the provisions of the Revised Code Section 1707.01 to 1707.45, inclusive, the law which covers the sale of securities in Ohio, in that he sold the promissory note marked Exhibit 1 on September 28, 1960, without having a license to do so, and without having had said instrument registered as required by law. Later the Court will take up the particular facts in this case and the particular rules of law which you must apply to those particular facts in reaching your verdict; but at this time I will instruct you as to certain general rules of law which the jury must apply in all criminal cases.

The Constitution of Ohio provides that no person shall be charged with an infamous crime except by an indictment by a grand jury. This indictment is not evidence, and you are not to treat it as such. It is merely the method provided by law to charge a person with crime. It is your duty to determine whether the Defendant is guilty of the crime with which he is charged in the indictment. To this indictment the Defendant has entered a plea of not guilty. Later the Court will read to you the indictment and also the law under the authority of which the indictment was brought, and explain just what the State must prove beyond a reasonable doubt before you can find the Defendant guilty.

[fol. 70] When a person is charged with the commission of a crime, the law presumes him to be innocent until the contrary is proved. Therefore, at the outset of this case, the law presumed, and it is your sworn duty to presume, this Defendant to be innocent. This presumption of innocence remains with the Defendant at all stages of the trial until, and unless, it is overcome by proof which establishes his guilt beyond a reasonable doubt.

It is a fundamental rule of law that he who asserts a fact, the existence of a fact, in a Court of Justice has the burden of proving that fact. In accordance with that rule, the State, having charged the Defendant with these offenses, it is the duty of the State to prove every essential element of the offenses beyond a reasonable doubt. The Legislature of Ohio has defined by statute the term reasonable doubt, and has provided that it is the duty of the Court in every criminal case to read that definition to the jury. It is very important that you listen carefully and understand the meaning of that statutory definition. The statute reads as follows:

"Reasonable doubt is not merely a possibility of doubt because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after entire consideration and comparison of all the evidence, leaves the

minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

Applying this definition to this case it means that, after a candid, careful and impartial consideration of all the evidence, you feel an abiding conviction to a moral certainty of the truth of the charges, then there is no reasonable doubt in your minds, and it is your duty to find the Defendant guilty as charged. If, on the other hand, after a candid, careful and impartial consideration of all the evidence, you cannot say that you feel an abiding conviction [fol. 71] to a moral certainty of the truth of the charge, then there is a reasonable doubt in your minds, and it is your duty to find the Defendant not guilty.

You shall not gather the impression from anything that has occurred during the trial that the Judge has any opinion in this case as to the guilt or innocence of the Defendant. The Judge has no right or authority to indicate by words or acts any opinion as to what facts are true or what facts are false, but the Court is the sole judge of the law. The evidence is not weighed by the Court.

The Court permits certain evidence to be presented, sometimes over the objection of counsel because, according to the rules of evidence, it tends to prove or disprove a material issue in the case. On the other hand, the Court sometimes prohibits certain evidence to be presented because, according to the rules of evidence, it does not tend to prove or disprove any material issue in the case. You are permitted to consider only such evidence as the Court has allowed to be presented. The truth or falsity of the evidence which is permitted to be presented is left entirely to the determination of the jurors, who are the sole judges of the facts and the credibility of the witnesses.

For the purpose of determining what credit or belief you will give to the testimony of the witnesses, you may consider their intelligence or lack of intelligence, his manner and conduct upon the witness stand, his frankness or lack of frankness, his opportunity of knowing about the

facts concerning which he testifies, any reluctance to testify, any feeling for or against either side, any interest in the outcome of the case, or whether the sole motive of the witness was to tell the truth, regardless of consequences. You may consider the reasonableness or unreasonableness, the probability or improbability of the statement of any witness. You may apply these tests and all other tests which you have found reliable in your daily life for testing the truth of the statements of your fellowmen. You may believe all, part or none of the testimony of any particular [fol. 72] witness, but you must carefully and impartially consider and analyze all the evidence, including the exhibits in the case.

The opening statements of counsel are not evidence. The purpose of these statements is to give you, in advance of the trial, an outline of the case which the parties expect to prove, so that you may be better able to follow and understand the testimony as it is presented.

The final arguments of counsel are not evidence. The purpose of these final arguments is to help you to arrive at a correct solution of the questions in the case by permitting counsel on each side to summarize the evidence as he views it and give you his opinion as to what the evidence proves or disproves. These arguments are valuable, but should be considered by you only insofar as they are based strictly upon the evidence and the law in the case.

The Constitution of Ohio provides that no person shall be required to testify against himself. However, the Constitution also provides that the failure of a Defendant to take the stand and testify may be commented upon by the State, and that you may draw any inference from his failure to testify that you deem a reasonable inference.

I will now instruct you as to the particular disputed facts in this case and the particular rules of law which you must apply to those particular facts in reaching your verdict.

In this case the Grand Jury of Hamilton County, Ohio, brought an indictment on the 12th day of May, which reads as follows, in substance, as follows:

The Grand Jurors of Hamilton County, in the name and by authority of the State of Ohio, upon their oaths present that Edgar I. Shott, Jr., on or about the 28th day of September, in the year 1960, at the County of Hamilton, State of Ohio aforesaid, did unlawfully sell, cause to be sold, offer for sale or cause to be offered for sale to Patrick Sestito a security, to-wit: A written instrument evidencing a promise to pay money, which the said Edgar I. Shott, Jr., [fol. 73] hereinbefore mentioned, was not then and there licensed to sell securities in accordance with the provisions of the Revised Code of Ohio Sections 1707.01 to 1707.45, inclusive, contrary to the form of the statute in such case made and provided.

The second count, the second charge, which is a different offense, although relating to the same transaction:

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present that Edgar I. Shott, Jr., on or about the 28th day of September in the year 1960, at the County of Hamilton, State of Ohio aforesaid, did knowingly, unlawfully and intentionally sell, cause to be sold, offered for sale or cause to be offered for sale to Patrick Sestito a security, to-wit: A written instrument evidencing a promise to pay money, which security was not then and there registered by description, nor then and there registered by qualification, in accordance with the provisions of the law of Ohio.

You will have this indictment with you in the jury room.

Briefly, Count No. 1 charges that Edgar I. Shott sold a security without having a license to do so; and Count No. 2, that he sold a security without having the same registered as required by law.

This indictment was brought by the Grand Jury under authority of Revised Code Sections 1707.01 to 1707.45, inclusive, known as the Security or Blue Sky Law of Ohio, and it was brought, more particularly, under the authority of Section 1707.44, the part of which is applicable to this case reads as follows:

"No person shall sell, cause to be sold, offer for sale or cause to be offered for sale securities without a license granted by the Division of Securities, unless the securities are of a kind specified by sub-section "G" of Section 1707.02." Later I will read to you the provisions of said sub-section "G", but at this time I will merely say that said sub-section "G" provides that certain instruments, [fol. 74] although legally they are securities, are exempt from the provisions of the security law; that is, they do not have to comply, if they are exempt, with the provisions of the law with reference to their sale. The law also provides that, unless it is exempted, an instrument which is a security must be registered with the Division of Securities before it can be lawfully sold.

The law also prescribes the punishment, but you are not concerned with the punishment. Your only duty is to find whether the Defendant is guilty or not guilty as charged in the indictment. It is the duty of the Court to impose the punishment provided by law if the jury finds the Defendant guilty.

It is a general rule of law that he who asserts in a Court of Law that certain facts exist has the burden or duty of proving the existence of those facts. Since the State has charged that this instrument marked Exhibit 1 is a security and was sold by the Defendant, Edgar I. Shott, without a license, and also without having the same registered, it is the duty of the State, before you can find the Defendant guilty, to prove beyond a reasonable doubt the existence of all the essential elements of the crimes charged in this indictment. These essential elements are:

1. That the offense, if any, was committed in Hamilton County and State of Ohio. This is not contradicted, and there is no contradictory evidence and, therefore, you may assume that the State has proved this beyond a reasonable doubt.

2. That the Defendant, Edgar I. Shott, was not licensed as required by law.

3. That the instrument which he is alleged to have sold was not registered as required by law. There was offered in evidence by the State a certificate that there was no record of such a license to the Defendant; and also a certificate that there was no record of the registration of the [fol. 75] instrument involved in this case. The law provides that such certificates are prima facie proof of said facts and are sufficient proof, unless the presumption is met by evidence to the contrary. There is no evidence to the contrary; in fact, the Defendant admitted in his opening statement that he did not have a license, and that the instrument was not registered. Therefore, you may assume that these two elements of the crimes have been proved beyond a reasonable doubt; namely, that the Defendant was not licensed as required by law, and that the instrument herein involved was not registered as required by law.

The fourth element is that the Defendant unlawfully, knowingly and intentionally sold, or caused to be sold, or offered for sale, or caused to be offered for sale, this instrument, Exhibit No. 1, to Patrick Sestito, on September 28, 1960.

The term "sold" as here used is defined in Revised Code Section 1707.01, sub-section "C", as follows:

"Sale has the full meaning of the term "sale" as applied by or accepted in Courts of Law or Equity."

The ordinary meaning of a sale that is accepted in a Court of Justice is a transfer of title to property or an interest in property for a consideration called a price. However, you will note that the statute further provides, as part of the definition of a sale as applied to this kind of a case, that it includes every disposition or attempt to dispose of a security or an interest therein.

The term "disposition" as here used is broader and more inclusive than the ordinarily accepted definition of a sale, which I read to you. "Disposition" means an intentional delivery of the instrument to Patrick Sestito in such a manner as to transfer to him a title to the instrument and all the rights created by that instrument, with full knowl-

edge that he was making such a transfer; that is, that the Defendant was making such a transfer.

[fol. 76] "Intention" is a state of the mind and, therefore, ordinarily, must be determined from all the surrounding circumstances. In determining whether there was an intentional transfer, you may consider all the circumstances surrounding the making of this instrument and the delivery of the same to Patrick Sestito. The State has offered evidence of such a transfer. There is no evidence to the contrary. In fact, the Defendant, Edgar I. Shott, admitted in his opening statement that he made such a transfer on that day to Patrick Sestito, claiming however, that he believed and intended the instrument to be merely evidence of a loan and a promise to repay that loan. The fact that he did not know it to be a security and did not intend it to be a security is immaterial if, in fact and in law, it is a security. Every person is presumed to know the law. Ignorance of the legal consequences of an act; that is, that the act is a crime, is no excuse.

The fifth element of the two offenses charged in the indictment is whether this instrument, Exhibit No. 1, is a security. Revised Code Section 1707.01, sub-section "B"—that is the section which gives definitions of a great many things involved in this law—sub-section "B", insofar as it is applicable to this case, defines a security as follows:

"Any instrument which represents title to or interest in profits or the credit of any person, agency, and so forth. It includes promissory notes. "Any instrument evidencing a promise or agreement to pay money, all forms a promise" —I am reading the statute—"any instrument of commercial paper, and any instrument which is evidence of an indebtedness."

What I have just read to you is only part of the definition of a security given by the statute. It also names other instruments, such as a certificate of stock, but you are not concerned with such other instruments. The instrument involved in this case and marked Exhibit 1 reads as follows:

[fol. 77] In figures, "$2,250.00, Cincinnati, Ohio, September 28, 1960. 62 days after date, for valued received, I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars, with interest at the rate of", blank, "per annum at" blank. It also contains in fine print certain other provisions which make it what is called a cognovit note, but you are not concerned with such other provisions.

The legal definition of a promissory note is as follows:

> "A promissory note is an unconditional promise to pay a sum certain in money at a certain time to bearer or order."

The Court instructs you that, as a matter of law, this instrument is a promissory note, and also a form of commercial paper; also, evidence of an indebtedness, and evidence of a promise or agreement to pay money. The mere fact that it promises to repay a loan is immaterial in this case. That, in and of itself, is immaterial. On its face it is a security under the statutory definition which I have read to you.

However, even though you find that the State has proved beyond a reasonable doubt that this instrument is a security and was knowingly, intentionally and unlawfully sold by the Defendant without a license and without registration, before you can find the Defendant guilty as charged, you must determine whether it is exempted by the statute. In this connection, so that you may determine whether this was exempted, I again call your attention to Revised Code Section 1707.44, the particular section of the security law under which this indictment was brought, and which provides, as I formerly read to you, that securities cannot be sold without a license and without registration. You will recall that section also contains this provision, "Unless the securities are of a kind specified in sub-section "G" [fol. 78] of Section 1707.02," and I told you I would explain that provision later. I now explain it.

Said Section 1707.02 provides that certain instruments, although legally securities, are exempt; that is, they may be sold without complying with the provisions of the security law, particularly the requirement that there must be a license to sell and the instrument must be registered. Said sub-section "G" provides as follows:

> "Commercial paper and promissory notes are exempt when they are not offered directly or indirectly for sale to the public."

In other words, even though this note is a security and you find it to be a security under the instruction I gave you, it may be exempt if it satisfies what I have just read to you.

The term "Offered to the public" means this; that they are open to common or general participation to any and all persons, as distinguished from an offer to a particular person or persons in the course of legitimate business, or in the course of usual and ordinary borrowing of money. The instrument is not exempt if it was offered for sale directly or indirectly to the public, as I have defined that term.

In determining whether this instrument is exempt, you must follow the provision of Section 1707.45, which reads in part as follows:

"In an indictment under Section 1707.44, it shall not be necessary to negative the existence of facts which would bring a security within Section 1707.02, sub-section "G", the one applying to this case which I read. It further provides:

> "The burden of proof shall be upon the party claiming the benefit of said section; that is, the burden of proof is upon the party who wants the benefit of this [fol. 79] instrument, if it is a security, being exempt from the other provisions of the law."

The meaning of this provision is that it is not the duty or burden of the State to show that the instrument is not

exempt. The above provision creates a presumption that an instrument which is a security is not exempt. The statutory provision makes it the duty or burden of the Defendant to prove by a preponderance of the evidence that the instrument is exempt; that is, that it was not offered directly or indirectly for sale to the public.

By preponderance of the evidence is meant the greater weight of the evidence. By the greater weight of the evidence is not necessarily meant the greater number of witnesses. It means that evidence which, after you have carefully and impartially considered it, you find it has the greater power of persuasion and, for that reason, it inclines your mind to that side of the question.

You can see that, by a preponderance of the evidence, is less burdensome proof than beyond a reasonable doubt, by which the State must prove its side of the case.

If you find, according to all the rules of law I have given you, that the State has proved beyond a reasonable doubt that this instrument, Exhibit No. 1, was sold or disposed of by Edgar I. Shott to Patrick Sestito in Hamilton County and State of Ohio on September 28, 1960, without a license and without being registered, and that said instrument is a security under the definition of the law which I read, you must render a verdict of guilty of both charges in the indictment, unless you further find that the Defendant has proved by a preponderance of the evidence that said instrument is exempt under the rules I have given you.

If you do not find that the State has proved beyond a reasonable doubt all these essential elements which I read to you; namely, that this instrument was sold or disposed of by Edgar I. Shott to Patrick Sestito in Hamilton County, Ohio, on September 28th without a license and without [fol. 80] being registered, and that said instrument is a security, if you do not find that the State has proved all those elements beyond a reasonable doubt, then your verdict must be not guilty of both charges in the indictment.

But, even though you do find that the State has proved beyond a reasonable doubt all the essential elements of the crimes charged in the indictment, if you also find that the

Defendant has proved by a preponderance of the evidence that this instrument is an exempt security under the rules I have given you, then your verdict must be not guilty of both counts of the indictment.

For your convenience there have been made up two forms of verdict. One reads: "We, the jury, on the issues joined, find the Defendant, Edgar I. Shott, Jr., guilty of violating Section 1707.44, as he stands charged in the first and second counts of the indictment."

The other one reads: "We, the jury, on the issues joined, find the Defendant, Edgar I. Shott, not guilty." You will, of course, use the form which is consistent with your verdict.

This is a criminal case, and no verdict can be rendered in such a case except on the agreement of all 12 jurors. I forget, I don't think any of you served even on a civil case, but anyhow, in civil cases nine or more is necessary for a verdict, and all who agree on a verdict in a civil case sign it, including the foreman if he is one of them. But in a criminal case all 12 jurors must agree before you can render a verdict.

Upon your retirement to the jury room, your first duty will be to select a foreman, or forelady, who will preside over your deliberations. In the event all 12 jurors agree upon a verdict, the foreman, and the foreman alone, or the forelady alone, will sign the verdict upon which all 12 agree. All 12 must agree before you can have a verdict, but if you reach a verdict, the foreman alone signs that verdict.

You will have with you in the jury room the indictment, these two forms of verdict, and also the exhibits in the case. [fol. 81] When considering this case, you will keep uppermost in your mind that Courts are established for one purpose only, and that is to do justice between the parties as nearly as it is humanly possible. They have no other purpose than this. It is your duty, under your oath, to find the facts and return them in your verdict without fear or favor, bias, prejudice or sympathy of any kind. Your verdict must be based solely on the law and the evidence. There is no occasion in this case for sympathy for the De-

fendant, the State or any other person. On the other hand, there is no place, of course, for any prejudice. The sole purpose on your part is to find the facts based upon the evidence introduced in the court room and the law which the Court has given you. Whatever your verdict may be, it must be the best that your conscience permits you to render, based solely on the law and the evidence in the case. Otherwise, you will have violated your oath.

Anything further?

Mr. Schoettmer: The State has nothing further, your Honor.

Mr. Andrews: The defense does, your Honor. We have a number of requests for additional charges.

(Discussion between Court and counsel at the Bench.)

The Court: If there is nothing further, Mr. Bailiff, take charge of the jury.

(Thereupon the jury retired to the jury room for deliberation.)

Mr. Andrews: Let the record show we are asking the Court to charge that the statute 1707.45, as to the burden of proof on the Defendant, has no application in this case, inasmuch as the State has elected to include allegations in the indictment that no exemption exists. The state did not have to do that by virtue of 1707.45, but it elected to so, therefore, we say the state has a burden of proving a [fol. 82] public offering, and the Defendant has no burden of proving that there was no public offering.

We also request the Court to charge on 1707.01 (E) (1), in which dealer is defined; and also under the same section (F) (1), in which the word "salesman" is defined.

We also ask the Court to charge the language of Section 1707.05, entitled "Securities requiring registration by description."

We ask the Court to charge on 1707.09, "Registration by qualification." Our position is that you did charge as far as there was no registration, but you did not charge as to what securities need to be registered and whether they had to be registered under 1707.05 or 1707.09.

We would also ask the Court to charge on 1707.06, regarding transactions requiring registration.

We also ask the Court to charge on 1707.14, sub-section "B" and (2) under that, entitled "Dealers license required, exemptions."

We ask the Court to charge that there is no burden of proof upon the Defendant in the absence of the State establishing a prima facie case of an offering to the public; that there is no burden of proof on the Defendant; that there is no burden of proof on the Defendant if the State's witness negatives an offering directly or indirectly to the public.

And finally, if there is any burden of proof on the Defendant, that burden may be established through evidence elicited from the State's witness on cross examination.

(After due deliberation, the jury rendered a verdict as appears of record in the cause.)

[fol. 83]

EXHIBIT IN SUPPORT OF PETITION

STATE'S EXHIBIT No. 1

$2250.00 Cincinnati, Ohio, September 28, 1960

Sixty (62) days after date for value received I promise to pay to the order of Patrick Sestito Twenty-two Hundred Fifty and no/100 dollars with Interest at the rate of ..... per centum per annum at ..... and I hereby authorize any Attorney at Law to appear in any Court Record in the State of Ohio, or any other State in the United States, after the above obligation becomes due and waive the issuing and service of process and confess a judgment against me in favor of the holder hereof, for the amount then appearing due, together with costs of suit, and thereupon to release all errors and waive all right of appeal.

SHOTT INVESTMENT CO.,

By: Edgar I. Shott, Jr.

No. .....

Due November 29, 1960

[fol. 84] EXHIBIT IN SUPPORT OF PETITION

STATE'S EXHIBIT No. 2

MICHAEL V. DISALLE
Governor

RANKIN M. GIBSON
Director of Commerce

(The Great Seal of Ohio)

State of Ohio
Department of Commerce
Division of Securities
Columbus 15
614 Ohio Departments Building
W. PATRICK GREEN
Chief of Division

CERTIFICATE OF THE DIVISION OF SECURITIES PURSUANT TO THE PROVISIONS OF SECTION 1707.30 OF THE REVISED CODE OF OHIO.

THIS IS TO CERTIFY that the records of the Division of Securities, Department of Commerce, State of Ohio, discloses that EDGAR I. SHOTT, JR., has at no time been issued a securities dealer or securities salesman's license by the Division of Securities pursuant to Sections 1707.01 to 1707.45, inclusive, of the Revised Code of Ohio, nor has application therefor been filed.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at Columbus, Ohio, this 6th day of June, 1961.

W. PATRICK GREEN,
Chief of Division.

[fol. 85]

EXHIBIT IN SUPPORT OF PETITION

STATE'S EXHIBIT No. 3

MICHAEL V. DISALLE
Governor

RANKIN M. GIBSON
Director of Commerce

(The Great Seal of Ohio)

State of Ohio
Department of Commerce
Division of Securities
Columbus 15
614 Ohio Departments Building
W. PATRICK GREEN
Chief of Division

CERTIFICATE OF THE DIVISION OF SECURITIES PURSUANT TO THE PROVISIONS OF SECTION 1707.30 OF THE REVISED CODE OF OHIO.

THIS IS TO CERTIFY that the records of the Division of Securities, Department of Commerce, State of Ohio, disclose that the instruments issued by EDGAR I. SHOTT, JR., evidencing a promise or an agreement to pay money have not been registered by description or by qualification, nor do they constitute the subject-matter of a transaction registered by description with the Division of Securities pursuant to Sections 1707.01 to 1707.45, inclusive, of the Revised Code of Ohio, nor has application therefor been received.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at Columbus, Ohio, this 6th day of June, 1961.

W. PATRICK GREEN,
Chief of Division.

NOTE: Defendant's Exhibit Nos. 4 and 5 marked for identification only; not received in evidence.

[fol. 86]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

MEMORANDUM OPINION AND ORDER—July 9, 1963

Petitioner was named in a two-count indictment returned by the grand jury of Hamilton County, Ohio and after trial was found guilty by a petit jury under both counts. Having exhausted his state remedies, and certiorari having been denied by the Supreme Court of the United States, petitioner has instituted this habeas corpus action to test the constitutionality of the proceeding resulting in his conviction. The indictment was returned under the provisions of the Ohio Securities Act, more commonly referred to as the Blue Sky Law (Ohio Revised Code 1707.01 through 1707.45). The first count charges the petitioner with having sold a security without having been licensed to make such a sale, and the second charges the sale of an unlicensed security. Both counts deal with one sale of a single security, and the evidence was limited to that transaction.

The entire factual presentation at trial was contained in the testimony of two witnesses and three documentary exhibits. The first witness and two of the exhibits dealt with conceded matters, establishing for the record the facts that petitioner was not licensed under the Ohio Securities Act to deal in securities, and that the instrument forming the basis of the indictment was not a registered security. The remaining exhibit was that instrument, a promissory note payable to the order of one Patrick Sestito and made by "Shott Investment Co., By: Edgar I. Shott, Jr., [the petitioner]." Patrick Sestito was the other witness, and his testimony dealt with his past and present relationship with petitioner and the circumstances of the transaction.

Referring to the promissory note, the trial court charged the jury, "on its face it is a security . . . ," and were the issue before us we would not hesitate to concur. However, the question is purely one of statutory interpretation and

has been laid to rest in the appellate procedures which preceded this action.

[fol. 87] Petitioner complains vigorously that he was deprived of a fair trial in violation of his constitutional rights by a portion of the prosecuting attorney's closing argument referring generally to the probability that petitioner negotiated similar promissory notes to other persons. These statements consumed a dozen lines in sixteen pages of summation in the printed record, and their exclusion might have been prudent. However, the trial court acted within the proper exercise of discretion in permitting this argument as being based upon inferences from the testimony, and it cannot now be said that petitioner was thereby deprived of any constitutional right. Without detailed elaboration, it is pointed out that the record establishes that Sestito went to petitioner's office with $2,000 in his pocket, where petitioner told him "that this money was being invested on financing buildings, and so forth;" that Sestito first said he thought he "could come up with a thousand, and then it sounded so good, I mean I come up with two thousand;" that asked what "sounded so good," he replied, "the percentage, twelve and a half per cent;" that he was shown some kind of document dealing with the history and condition of the Shott Investment Company; and that the note was not made by petitioner individually, but by an investment company. In this connection, the testimony of Sestito of a telephone call received by him from petitioner's secretary on the due date of the note is interesting. Without objection, he was permitted to testify that she called and asked whether Sestito wanted to "draw down" his money or "parlay" it. He elected the former alternative, and it is hard to reconcile this line of evidence with an intention on Sestito's part to a make a personal loan to petitioner, or, in fact with any intention other than that of making a productive investment. To the extent that any issue on this point is before us in this habeas corpus proceeding we find the position taken by the trial court not to have been improper.

[fol. 88] Various other of petitioner's complaints are intertwined with those that have been reviewed and are not felt to merit individual treatment. While at this moment in the history of Federal jurisprudence we are unsure of the extent to which such subjects are reviewable by a District Court in habeas corpus, since we are not of a disposition differing from the state trial court no problem is presented in this area. We now turn, however, to an issue which is felt to be squarely presented in this action.

That issue deals with the statutory presumption under which after a showing by the state beyond a reasonable doubt of a sale of a security, the burden shifts to the defendants to show the exempt nature of the transaction or security by a preponderance of the evidence. Anticipating an argument, in his brief petitioner recognized the validity of kindred presumptions created upon the showing by the prosecution of possession of morphine, of smoking opium, of an unlicensed still and of policy slips. Without using the phrases, petitioner seems to attempt to make a distinction between things malum per se and malum prohibitum. Whether he quite reaches this argument or not, petitioner does undertake to establish a distinction by contending that "the single Sestito loan transaction is itself neither unusual nor sinister," but we find the argument to be without validity. Specifically, we hold that the statutory presumption, as here applied, was not unlawful as violative of the Fourteenth Amendment to the Constitution, even when considered in the light of the tests laid down in *Morrison* v. *California*, 291 U.S. 82 (1934).

Petitioner has argued that the charge of the court was tantamount to the direction of a verdict for the state. To the extent that there is accuracy in this contention, it resulted from the frank admission of the petitioner of the factual situation involved; in fact, the most damning case against him heard by the jury was contained in his opening statement. His admissions on the record resolved most issues, but at least one important issue was presented to [fol. 89] the jury. That issue was whether or not there had been a direct or indirect offering of securities for sale to the

public. The record contains evidence on this point and it was properly submitted to the jury without depriving petitioner of his constitutional rights.

Finally, we find nothing so vague or indefinite in the provisions of the Ohio Securities Act found to have been violated as to cause petitioner's conviction to amount to a deprivation of due process of law, and therefore,

It Is Ordered that the petition herein should be and it is hereby dismissed, with notation of petitioner's exception.

John W. Peck, District Judge.

July 9, 1963

In the United States District Court
For the Southern District of Ohio

Notice of Appeal—Filed July 10, 1963

Notice is hereby given that the Relator-Appellant, above named, Edgar I. Shott, Jr., hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Order dismissing Relator-Appellant's petition for a writ of habeas corpus.

In the United States District Court
For the Southern District of Ohio

Certificate of Probable Cause—August 12, 1963

Upon application of petitioner Edgar I. Shott, Jr. for a certificate of probable cause pursuant to the requirements of Section 2253, Title 28, U.S.C.,

It Is Ordered that a certificate of probable cause be and hereby is, entered.

John W. Peck, District Judge.

August 12, 1963

[fol. 90]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION
—June 16, 1964

Before: Miller and Cecil, Circuit Judges, and Fox, District Judge.

This cause is argued by Thurman Arnold for relator-appellant and by Calvin Prem for respondent-appellee and is submitted to the Court.

[fol. 91]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15538

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

UNITED STATES OF AMERICA, ex rel. EDGAR I. SHOTT, JR.,
Relator-Appellant,

v.

DAN TEHAN, Sheriff of Hamilton County,
Respondent-Appellee.

OPINION—Decided November 10, 1964

Before: Miller and Cecil, Circuit Judges, and Fox, District Judge.

MILLER, Circuit Judge. Appellant, Edgar I. Shot, Jr., a member of the bar of the State of Ohio, was convicted in

the state court of a violation of the Ohio Securities Act, generally referred to as the Ohio Blue Sky Law. In the trial at the close of the State's case, appellant's counsel, being of the opinion that the State had not made out a case, did not call appellant as a witness or introduce further evidence, but moved for a directed verdict. The motion was overruled and the case submitted to the jury, which returned a verdict of guilty. Appellant received a sentence of one to five years imprisonment in the state penitentiary.

The judgment was affirmed by both the Ohio Court of Appeals and the Ohio Supreme Court. An appeal to the United States Supreme Court was dismissed, but was treated as an application for writ of certiorari, which was denied. A petition for rehearing was also denied.

[fol. 92] Appellant contended in the trial court and on the appeals that the Ohio Blue Sky Law, under which he was convicted, was invalid under the due process clause of the Fourteenth Amendment because it set no ascertainable standard of conduct, required no specific intent, and was so indefinite and vague as to be void. In addition to other defenses, he charged misconduct on the part of the prosecutor in closing argument to the jury in improperly commenting upon the failure of the appellant to testify.

Following the exhaustion of his state remedies, appellant filed the present habeas corpus proceeding in the United States District Court, which, after oral argument, was dismissed by the District Judge, from which order the present appeal was taken. The District Judge entered the necessary Certificate of Probable Cause required by Section 2253, Title 28, United States Code.

The alleged improper conduct of the state prosecutor in his closing argument to the jury about appellant's failure to testify raises a constitutional question under the Fifth and Fourteenth Amendments to the United States Constitution, to which we will first direct our attention. We are of the opinion that this issue was properly raised by the present habeas corpus proceeding. Sections 2241-2254, Title 28, United States Code; *Rogers* v. *Richmond*, 365 U.S. 534,

540; *Fay* v. *Noia,* 372 U.S. 391, 420-424; *Irvin* v. *Dowd,* 366 U.S. 717.

Without reviewing the comment of the prosecuting attorney to the jury on appellant's failure to testify, it is sufficient to state that if this case had been tried in the United States District Court for an alleged federal offense, it would have violated appellant's constitutional rights against self-incrimination under the Fifth Amendment to the Constitution of the United States. The right contained in the Fifth Amendment that the accused in a criminal trial in the federal court shall not be compelled to be a witness against himself includes both the right not to testify and the right that such failure to testify shall not be subject of comment by the attorney for the prosecution. *Wilson* v. *United States,* 149 U.S. 60; *Ing* v. *United States,* 278 F (2) 362, 367, C.A. 9th; *De Luna* v. *United States,* 308 F (2) 140, 142-143, 154, C.A. 5th; *United States* v. *Ragland,* 306 F (2) 732, 736, C.A. 4th, cert. denied, 371 U.S. 949. See also: *Johnson* v. *United States,* 318 U.S. 189, 196-197, rehearing denied, 318 U.S. 801; *McKnight* v. *United States,* 115 F. 972, 982, C.A. 6th.

[fol. 93] At the time of the briefing by the parties of this case, their contentions were as follows: Appellee contended that the constitutional right against self-incrimination under the Fifth Amendment is applicable only to trials in federal courts, and that it is not applicable to trials in the state courts. It was so held in *Adamson* v. *California,* 332 U.S. 46, rehearing denied, 332 U.S. 784; and *Twining* v. *New Jersey,* 211 U.S. 78.

Article I, Section 10 of the Constitution of Ohio, provides, in part, as follows:

> "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

Appellee relied upon the foregoing Supreme Court decisions and the Ohio constitutional and statutory provisions

in support of the right of the State to comment upon the failure of appellant to testify.

Appellant contended that although there is no specific provision in the United States Constitution granting in express words this right to the accused in a criminal trial in a state court, the right is nevertheless guaranteed by the Due Process Clause of Section 1 of the Fourteenth Amendment. He conceded that the Supreme Court had held that the Fourteenth Amendment does not automatically protect against infringement by the State of the rights included in the first eight amendments to the Constitution of the United States, which are protected against infringement by the federal government. *Palko* v. *Connecticut*, 302 U.S. 319, 323-324; *Knapp* v. *Schweitzer*, 357 U.S. 371, note 5 at p. 378, rehearing denied, 358 U.S. 860. It was also recognized that the Supreme Court had specifically ruled that the privilege against self-incrimination granted by the Fifth Amendment was not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey*, supra, 211 U.S. 78; *Adamson* v. *California*, supra, 332 U.S. 46; *Cohen* v. *Hurley*, 366 U.S. 117, 127-128, rehearing denied, 374 U.S. 857; *Knapp* v. *Schweitzer*, supra, 357 U.S. 371, 374-375. Appellant's argument was that recent decisions of the Supreme Court indicated that the [fol. 94] ruling with respect to self-incrimination would be reconsidered and that the Court would rule that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan*, 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any

questions. We find no merit in this factual distinction. As pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.

The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.

The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

[File endorsement omitted]

[fol. 95]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT—Filed November 10, 1964

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that Relator-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court. Carl W. Reuss, Clerk.

[fol. 96] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 97]

SUPREME COURT OF THE UNITED STATES

No. 877, October Term, 1964

DAN TEHAN, Sheriff of Hamilton County, Ohio, Petitioner,

v.

UNITED STATES ex rel. EDGAR I. SHOTT, JR.

ORDER ALLOWING CERTIORARI—May 24, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted and the case is placed on the summary calendar. The parties are requested to brief and argue the question of the retroactivity of the doctrine announced in Griffin v. California, No. 202, October Term, 1964, decided by this Court on April 28, 1965.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas dissents, being of the view that the case should be remanded to the District Court for a finding on allegation that respondent at the trial waived any objection to the comment made on his failure to testify.

The Chief Justice took no part in the consideration or decision of this petition.

FILED
FEB 4 1965
JOHN F. DAVIS, CLERK

No. [redacted] 52

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1964

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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In the

Supreme Court of the United States

October Term, 1964

No. ———

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on November 10, 1964.

OPINION BELOW

The decision and opinion of the United States Court of Appeals for the Sixth Circuit is reported in 337 F. (2d) 990.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 10, 1964. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether the protection against self incrimination under the Fifth Amendment includes not only the right of defendant not to take the stand as witness in his own behalf, but also the right that such refusal shall not be commented upon by counsel for the prosecution, where the Ohio Constitution and statute specifically provide the opportunity to comment?

STATEMENT OF THE CASE

On the twelfth day of May, 1961, an indictment against Edgar I. Shott, Jr. was returned by the Grand Jury of Hamilton County, Ohio, to the Court of Common Pleas. In two separate counts in the indictment Shott was charged with selling a security without a license in violation of *Section 1707.44 (A), Revised Code of Ohio,* and selling a non-registered security in violation of *Section 1707.44 (C), Revised Code of Ohio.* Shott pleaded not guilty on arraignment, and upon trial was found guilty by a jury of both charges. The Court sentenced him to the Penitentiary for a period of 1-5 years.

The Court of Appeals of the First District of Ohio, and the Supreme Court of Ohio, subsequently affirmed the judgment. An appeal to the United States Supreme Court was dismissed, but was treated as an application for a writ of certiorari, which was denied. A petition for re-hearing was also denied.

The Supreme Court of Ohio issued a mandate to Dan Tehan, Sheriff of Hamilton County, Ohio, to carry into

effect the sentence imposed by the Court of Common Pleas. Shott filed a habeas corpus proceeding in the United States District Court for the Southern District of Ohio, Western Division. After oral argument the proceeding was dismissed by the District Judge, from which order the petitioner appealed to the United States Court of Appeals for the Sixth District. The Court of Appeals set aside the order of the District Court and remanded the case to the District Court for further proceedings.

STATEMENT OF FACTS

Patrick Sestito, a resident of Cincinnati, Ohio, in the latter part of the Summer of 1960, heard about investment opportunities with the defendant from certain car dealers on Reading Road, Cincinnati, Ohio. (R. 27) On September 28, 1960, with $2,000.00 in his pocket, Sestito went to the office of Edgar I. Shott, Jr., in the Atlas Bank Building, Walnut Street, Cincinnati, Ohio. He had not been in previous contact with the defendant concerning investments, and had not been contacted by the defendant in any manner. Mr. Sestito and the defendant had a discussion about investing the money of Mr. Sestito in buildings and financing. (R. 18, 19). At the time Shott explained the workings of the Shott Investment Company to Mr. Sestito and showed him a draft of the progress of the Shott Investment Company from its inception. (R. 20, 21).

Mr. Sestito was satisfied with the 12½% profit for a period of 62 days offered by the defendant, and he entrusted his $2,000.00 to the defendant and received a promissory note for the money. (R. 21). The note stated that Mr. Shott would pay the sum of $2,250.00 to Patrick Sestito on November 29, 1960.

On the due date the secretary of the defendant called Mr. Sestito and asked him if he wanted to "let the note

ride," or, in other words, to reinvest it. (R. 24). Mr. Sestito decided against reinvestment with the Shott Investment Company, went to the office of the defendant, and received a check of the defendant in full payment of the amount of the note. (R. 25).

The defendant was not licensed with the Division of Securities of the State of Ohio (R. 12), and the security had never been registered with the department of Securities of the State of Ohio. (R. 13).

REASONS FOR GRANTING THE WRIT

The trial of the case of *State of Ohio* v. *Edgar I Shott, Jr.* was so unique and so different from the usual presentation of evidence to a jury that it must be considered an exception. As an exception to the usual presentment of fact it necessarily follows that it is an exception to the usual application of law. A basic tenet was recently stated by Justice Brennan in *Fay* v. *Noia,* 372 U.S. 391, at page 440:

> "Each case must stand on its facts."

In this case we feel that the application of the concept of the law which does not take the facts into consideration would destroy our direction in the fulfillment of the law.

We are aware at this writing that the Supreme Court of the United States has granted certiorari in *Eddie Dean Griffin, petitioner,* v. *State of California,* 202, October Term, 1964. In the general broad terms of law the first question presented in the *Griffin* case is similar to the question in the *Shott* case. The State of Ohio has a provision in its *Constitution, Article I, Section 10,* in part as follows:

> "* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be the subject of comment by counsel * * *"

Because Ohio's constitutional provision is similar in scope to the California Constitution's Article I, Section 13, in the trial of the *Shott* case, as well as the trial of the *Griffin* case, counsel availed themselves of the opportunity granted by their respective Constitutions to comment on the failure of the respective defendants to take the stand in his own behalf. Without recognizing a difference in the facts of the trial it would appear that a broad legal brush could cover both cases.

In *Malloy* v. *Hogan*, 378 U.S., page 1 (1964), the Supreme Court held that the Fifth Amendment privilege against compulsory self incrimination is protected by the Fourteenth Amendment against abridgment by the states. The question in *Griffin*, which the Supreme Court must decide, is whether comment by the prosecution on the failure of the defendant to take the stand as a witness in his own behalf is a violation of the privilege against compulsory self incrimination.

The United States Court of Appeals for the Sixth Circuit, in the case of *United States of America ex rel. Edgar I. Shott, Jr.* v. *Dan Tehan, Sheriff of Hamilton County, Ohio*, No. 15538, in an opinion filed November 10, 1964, decided a similar issue. The Court found:

> "* * * The protection against self incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution."

The decision of the United States Court of Appeals for the Sixth Circuit may very well be similar to the decision of the United States Supreme Court in *Griffin*. Even in this event we contend that the decision in the *Shott* case in the Court of Appeals should be reversed. Of course, if the Supreme Court in the *Griffin* case holds contrary to the

decision of the Court of Appeals in *Shott,* a reversal would be in order.

Our main contention in requesting a reversal is that Shott, by his admission of, and acquiescence in, the stipulations, concessions and agreements made by counsel in open court in his opening statement to the jury, and by Shott's acceptance of the comment made by his counsel in final argument on his failure to take the stand, waived his constitutional rights under the Fifth Amendment.

On the first day of trial, the defendant being present, one of the defense counsel spoke to the jury as follows: (R. 6)

> "As you have been told, the defendant, Ed Shott, is a lawyer, actively engaged in the practice of law in his community. He is being tried for an alleged violation of the Ohio Securities Law, better known as the Blue Sky Law. If I seem to be reading a portion of my opening statement, it is because the defense believes that the whole, unmitigated truth, told accurately and precisely, will establish the defendant's innocence. I am, therefore, not permitting myself that margin of error which is inevitably inherent in any extemporaneous statement, no matter how carefully it may be prepared. * * *
> The evidence will show that this defendant did not have a license to sell securities, and we will agree that he did not have a license. The evidence will show that Mr. Shott never registered a security, or anything which these prosecuting attorneys believe to be a security, with the Division of Securities. We will agree that he never so registered anything purporting to be of that character."

And shortly thereafter counsel on behalf of the defendant, Shott, said further: (R. 8)

> "* * * which we will admit constitutes a promissory note."

The Court: "I didn't quite get that."
Mr. Lloyd: "I say it was reduced to a writing, which we will admit constitutes a promissory note."

Counsel continued in his reading and said: (R. 8)

"Now, the defendant will admit and concede precisely what his idea, what his scheme, plan and system was in entering into this loan transaction with Pat Sestito. It was simply this: The defendant was loaning money to one Leslie D. Stickler, who was borrowing it regularly from him for the purpose, according to Stickler, of enabling Stickler to make short-term, high-interest loans to contractors. When Shott borrowed the money from Sestito, it was his intention: that is, Shott's intention and plan to loan this money to Stickler, and to pay Sestito for the use of his money; that is, Sestito's money, one-half of the amount which Stickler had agreed to pay Shott for the use of Shott's money."

We wholeheartedly agree with the law laid down by the Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335, that a person charged with a crime must be accorded counsel in order for that person to receive the due process of law. We contend that to that right is the responsibility of being bound by the distinct and formal admissions of fact made by counsel at the trial in open court. We contend that in this case, in this formal and solemn atmosphere, the defendant, Shott, himself a lawyer, rested, and by his silence accepted and adopted the stipulations and admissions of his lawyer. The relationship of these men was such that the words and actions of the agent were those of the principal. The defendant was in complete accord with the words uttered, and at no time gave the slightest indication of rebuke or rejection. The Court accepted these stipulations as part of the Record of the case.

The United States District Court for the Southern District of Ohio, Western Division, in its memorandum opin-

ion and order filed July 9, 1963, was also impressed by the admissions of the defendant, and stated as follows: (page 4)

> "Petitioner has argued that the charge of the Court was tantamount to the direction of a verdict for the State. To the extent that there is accuracy in this contention, it resulted from the frank admission of the petitioner of the factual situation involved; in fact, the most damning case against him heard by the jury was contained in his opening statement. His admissions on the record resolved most issues, but at least one important issue was presented to the jury. That issue was whether or not there had been a direct or indirect offering of the securities for sale to the public. The record contains evidence on this point, and it was properly submitted to the jury without depriving petitioner of his constitutional rights."

There can be no doubt that a defendant has the power to waive a constitutional right. *Johnson* v. *Zerbst,* 304 U.S. 458. It has long been a law of Ohio and elsewhere that an attorney has the power to bind his client. In *Syllabus 2* of *Garrett* v. *Hansue,* 53 O.S. 482, the Supreme Court of Ohio held as follows:

> "An attorney of record has power to do on behalf of his client all acts, in or out of court, necessary or incidental to the prosecution, defense or management of the action, and which affect only the remedy and not the right, and this includes the power to waive objections to evidence and enter into stipulations for the admission of facts on the trial."

In normal sequence, the defendant being present, his defense counsel addressed the jury in his final argument and stated: (R. 54)

> "Now, I would like to meet head-on his allegation that the defendant did not take the stand in this case and

that he is indicating his guilt because he is not taking the stand. I will tell you why the defendant did not take the stand in this case. Because I refused to let him take the stand * * *"

The State contends that the defendant testified in the trial through the lips of his counsel, and thereby waived his constitutional privilege to refuse to testify in his own behalf. There can be no doubt that the presentment and comment by counsel of the defendant was a well prepared plan participated in by the defendant. Even though the defendant did not perform the physical act of taking the witness stand he cannot now be heard to say that he did not present evidence to the jury in his own behalf.

In like manner, defendant and his counsel consumed a full day to present the final argument to the jury in behalf of the defendant. As the defendant sat by he permitted his counsel to read from the prepared final argument, during which counsel attempted to explain the reason that the defendant did not take the witness stand. This action of the defendant and his counsel in so doing waived the constitutional privilege of the defendant under these circumstances.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MELVIN G. RUEGER
Prosecuting Attorney
CALVIN W. PREM
Ass't Prosecuting Attorney
HARRY C. SCHOETTMER
Ass't Prosecuting Attorney
Attorneys for Petitioner

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Article I, Section 10, Ohio Constitution:

"Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have

compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense."

Section 2945.43, Revised Code of Ohio:

"On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. The failure of such person to testify may be considered by the court and jury and may be made the subject of comment by counsel."

APPENDIX B

In the

UNITED STATES DISTRICT COURT
For the Southern District of Ohio
Western Division

Civil Action No. 5376

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,
Relator,

v.

DAN TEHAN,
Sheriff of Hamilton County,
Respondent.

MEMORANDUM OPINION AND ORDER
(Filed July 9, 1963.)

Petitioner was named in a two-count indictment returned by the grand jury of Hamilton County, Ohio and after trial was found guilty by a petit jury under both counts. Having exhausted his state remedies, and certiorari having been denied by the Supreme Court of the United States, petitioner has instituted this habeas corpus action to test the constitutionality of the proceeding resulting in his conviction. The indictment was returned under the

provisions of the Ohio Securities Act, more commonly referred to as the Blue Sky Law (Ohio Revised Code 1707.01 through 1707.45). The first count charges the petitioner with having sold a security without having been licensed to make such a sale, and the second charges the sale of an unlicensed security. Both counts deal with one sale of a single security, and the evidence was limited to that transaction.

The entire factual presentation at trial was contained in the testimony of two witnesses and three documentary exhibits. The first witness and two of the exhibits dealt with conceded matters, establishing for the record the facts that petitioner was not licensed under the Ohio Securities Act to deal in securities, and that the instrument forming the basis of the indictment was not a registered security. The remaining exhibit was that instrument, a promissory note payable to the order of one Patrick Sestito and made by "Shott Investment Co., By: Edgar I Shott, Jr. [the petitioner]." Patrick Sestito was the other witness, and his testimony dealt with his past and present relationship with petitioner and the circumstances of the transaction.

Referring to the promissory note, the trial court charged the jury, "on its face it is a security . . .," and were the issue before us we would not hesitate to concur. However, the question is purely one of statutory interpretation and has been laid to rest in the appellate procedures which preceded this action.

Petitioner complains vigorously that he was deprived of a fair trial in violation of his constitutional rights by a portion of the prosecuting attorney's closing argument referring generally to the probability that petitioner negotiated similar promissory notes to other persons. These statements consumed a dozen lines in sixteen pages of summation in the printed record, and their exclusion might

have been prudent. However, the trial court acted within the proper exercise of discretion in permitting this argument as being based upon inferences from the testimony, and it cannot now be said that petitioner was thereby deprived of any constitutional right. Without detailed elaboration, it is pointed out that the record establishes that Sestito went to petitioner's office with $2,000 in his pocket, where petitioner told him "that this money was being invested on financing buildings, and so forth;" that Sestito first said he thought he "could come up with a thousand, and then it sounded so good, I mean I come up with two thousand;" that asked what "sounded so good," he replied, "the percentage, twelve and a half per cent;" that he was shown some kind of document dealing with the history and condition of the Shott Investment Company; and that the note was not made by petitioner individually, but by an investment company. In this connection, the testimony of Sestito of a telephone call received by him from petitioner's secretary on the due date of the note is interesting. Without objection, he was permitted to testify that she called and asked whether Sestito wanted to "draw down" his money or "parlay" it. He elected the former alternative, and it is hard to reconcile this line of evidence with an intention on Sestito's part to make a personal loan to petitioner, or, in fact, with any intention other than that of making a productive investment. To the extent that any issue on this point is before us in this habeas corpus proceeding we find the position taken by the trial court not to have been improper.

Various other of petitioner's complaints are intertwined with those that have been reviewed and are not felt to merit individual treatment. While at this moment in the history of Federal jurisprudence we are unsure of the extent to which such subjects are reviewable by a District Court in habeas corpus, since we are not of a disposition

differing from the state trial court no problem is presented in this area. We now turn, however, to an issue which is felt to be squarely presented in this action.

That issue deals with the statutory presumption under which after a showing by the state beyond a reasonable doubt of a sale of a security, the burden shifts to the defendant to show the exempt nature of the transaction or security by a preponderance of the evidence. Anticipating an argument, in his brief petitioner recognized the validity of kindred presumptions created upon the showing by the prosecution of possession of morphin, of smoking opium, of an unlicensed still and of policy slips. Without using the phrases, petitioner seems to attempt to make a distinction between things malum per se and malum prohibitum. Whether he quite reaches this argument or not, petitioner does undertake to establish a distinction by contending that "the single Sestito loan transaction is itself neither unusual nor sinister," but we find the argument to be without validity. Specifically, we hold that the statutory presumption, as here applied, was not unlawful as violative of the Fourteenth Amendment to the Constitution, even when considered in the light of the tests laid down in *Morrison* v. *California,* 291 U.S. 82 (1934).

Petitioner has argued that the charge of the court was tantamount to the direction of a verdict for the state. [To the extent that there is accuracy in this contention, it resulted from the frank admission of the petitioner of the factual situation involved; in fact, the most damning case against him heard by the jury was contained in his opening statement. His admissions on the record resolved most issues, but at least one important issue was presented to the jury. That issue was whether or not there had been a direct or indirect offering of securities for sale to the public. The record contains evidence on this point and it was prop-

erly submitted to the jury without depriving petitioner of his constitutional rights.]

Finally, we find nothing so vague or indefinite in the provisions of the Ohio Securities Act found to have been violated as to cause petitioner's conviction to amount to a deprivation of due process of law, and therefore,

IT IS ORDERED that the petition herein should be and it is hereby dismissed, with notation of petitioner's exception.

/s/ JOHN W. PECK, District Judge

APPENDIX C

JUDGMENT ENTRY OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed November 10, 1964.)

No. 15,538

(CAPTION OMITTED.)

Before: MILLER and CECIL, Circuit Judges, and FOX, District Judge.

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby set aside and the case remanded to the District Court for further proceedings consistent with the opinion.

It is further ordered that Relator-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

CARL W. REUSS
Clerk

APPENDIX D

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided November 10, 1964.)

No. 15,538

(CAPTION OMITTED.)

Before: MILLER and CECIL, Circuit Judges, and FOX, District Judge.

MILLER, Circuit Judge. Appellant, Edgar I Shott, Jr., a member of the bar of the State of Ohio, was convicted in the state court of a violation of the Ohio Securities Act, generally referred to as the Ohio Blue Sky Law. In the trial at the close of the State's case, appellant's counsel, being of the opinion that the State had not made out a case, did not call appellant as a witness or introduce further evidence, but moved for a directed verdict. The motion was overruled and the case submitted to the jury, which returned a verdict of guilty. Appellant received a sentence of one to five years imprisonment in the state penitentiary.

The judgment was affirmed by both the Ohio Court of Appeals and the Ohio Supreme Court. An appeal to the United States Supreme Court was dismissed, but was treated as an application for writ of certiorari, which was denied. A petition for rehearing was also denied.

Appellant contended in the trial court and on the appeals that the Ohio Blue Sky Law, under which he was convicted, was invalid under the due process clause of the Fourteenth Amendment because it set no ascertainable standard of conduct, required no specific intent, and was so indefinite and vague as to be void. In addition to other defenses, he charged misconduct on the part of the prosecutor in closing argument to the jury in improperly commenting upon the failure of the appellant to testify.

Following the exhaustion of his state remedies, appellant filed the present habeas corpus proceeding in the United States District Court, which, after oral argument, was dismissed by the District Judge, from which order the present appeal was taken. The District Judge entered the necessary Certificate of Probable Cause required by Section 2253, Title 28, United States Code.

The alleged improper comment of the state prosecutor in his closing argument to the jury about appellant's failure to testify raises a constitutional question under the Fifth and Fourteenth Amendments to the United States Constitution, to which we will first direct our attention. We are of the opinion that this issue was properly raised by the present habeas corpus proceeding. *Sections 2241-2254, Title 28, United States Code; Rogers* v. *Richmond,* 365 U.S. 534, 540; *Fay* v. *Noia,* 372 U.S. 391, 420-424; *Irvin* v. *Dowd,* 366 U.S. 717.

Without reviewing the comment of the prosecuting attorney to the jury on appellant's failure to testify, it is sufficient to state that if this case had been tried in the United States District Court for an alleged federal offense, it would have violated appellant's constitutional rights against self-incrimination under the Fifth Amendment to the Constitution of the United States. The right contained in the Fifth Amendment that the accused in a criminal trial in the federal court shall not be compelled to be a witness

against himself includes both the right not to testify and the right that such failure to testify shall not be subject of comment by the attorney for the prosecution. *Wilson* v. *United States,* 149 U.S. 60; *Ing* v. *United States,* 278 F(2) 362, 367, C.A. 9th; *De Luna* v. *United States,* 308 F(2) 140, 142-143, 154, C.A. 5th; *United States* v. *Ragland,* 306 F(2) 732, 736, C.A. 4th, cert. denied, 371 U.S. 949. See also: *Johnson* v. *United States,* 318 U.S. 189, 196-197, rehearing denied, 318 U.S. 801; *McKnight* v. *United States,* 115 F. 972, 982, C.A. 6th.

At the time of the briefing by the parties of this case, their contentions were as follows: Appellee contended that the constitutional right against self-incrimination under the Fifth Amendment is applicable only to trials in the federal courts, and that it is not applicable to trials in the state courts. It was so held in *Adamson* v. *California,* 332 U.S. 46, rehearing denied, 332 U.S. 784; and *Twining* v. *New Jersey,* 211 U.S. 78.

Article I, Section 10 of the Constitution of Ohio, provides, in part, as follows:

> "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

Appellee relied upon the foregoing Supreme Court decisions and the Ohio constitutional and statutory provisions in support of the right of the State to comment upon the failure of appellant to testify.

Appellant contended that although there is no specific provision in the United States Constitution granting in express words this right to the accused in a criminal trial in a state court, the right is nevertheless guaranteed by

the Due Process Clause of Section 1 of the Fourteenth Amendment. He conceded that the Supreme Court had held that the Fourteenth Amendment does not automatically protect against infringement by the State of the rights included in the first eight amendments to the Constitution of the United States, which are protected against infringement by the federal government. *Palko* v. *Connecticut,* 302 U.S. 319, 323-324; *Knapp* v. *Schweitzer,* 357 U.S. 371, note 5 at p. 378, rehearing denied, 358 U.S. 860. It was also recognized that the Supreme Court had specifically ruled that the privilege against self-incrimination granted by the Fifth Amendment was not safeguarded against state action by the Fourteenth Amendment. *Twining* v. *New Jersey, supra,* 211 U.S. 78; *Adamson* v. *California,* supra, 332 U.S. 46; *Cohen* v. *Hurley,* 366 U.S. 117, 127-128, rehearing denied, 374 U.S. 857; *Knapp* v. *Schweitzer,* supra, 357 U.S. 371, 374-375. Appellant's argument was that recent decisions of the Supreme Court indicated that the ruling with respect to self-incrimination would be reconsidered and that the Court would rule that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan,* 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states.

Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any questions. We find no merit in this factual distinction. As

pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.

The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board,* 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.

The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 52

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Petitioner,

v.

UNITED STATES OF AMERICA, ex rel. EDGAR I. SHOTT, JR.,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DATED: MARCH 2, 1965

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 877

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Petitioner,

v.

UNITED STATES OF AMERICA, ex rel. EDGAR I. SHOTT, JR.,
Respondent.

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT

Respondent asserts that this Court should deny the instant Petition for Certiorari for the following reasons:

1. The opinion of the Sixth Circuit, 337 F.2d 990, properly interprets this Court's opinion in *Malloy* v. *Hogan,* 378 U.S. 1 (1964), which held that the Fifth Amendment privilege against compulsory self-incrimination is protected by the Fourteenth Amendment

against abridgment by the states. As the Sixth Circuit held, this constitutional protection necessarily includes not only:

> "the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution." (377 F.2d at 991)

This holding accords with the consistent line of precedents in federal courts that the right of self-incrimination requires that the prosecutor refrain from commenting on a defendant's failure to testify. *Wilson* v. *United States,* 149 U.S. 60 (1893); *De Luna* v. *United States,* 308 F.2d 140, 142-143, 154 (5th Cir. 1962); *United States* v. *Ragland,* 306 F.2d 732, 736 (4th Cir. 1962), *cert. denied,* 371 U.S. 949; *Ing* v. *United States,* 278 F.2d 362, 367 (9th Cir. 1960). *See also, Johnson* v. *United States,* 318 U.S. 189 (1943); *McKnight* v. *United States,* 115 Fed. 972, 982 (6th Cir. 1902).

2. Contrary to Petitioner's assertions, nothing in the case of *Griffin* v. *California,* No. 202, in which certiorari has been granted, even vaguely relates to the question Petitioner presents.

3. It is specious to claim, as does Petitioner in presenting its "main contention," that Respondent "waived" his constitutional rights against self-incrimination. This is the first time in this protracted proceeding that this obviously groundless claim has been made. Nothing in the trial of this case even remotely suggests that Respondent has impliedly waived his constitutional rights.

It is fully apparent that the judgment and opinion of the Court of Appeals properly interprets this

Court's holding in *Malloy* v. *Hogan*. The petition for certiorari should be denied.

Respectfully submitted

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FILE COPY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. [redacted] 52

DAN TEHAN, Sheriff of Hamilton County, Ohio,
Petitioner,
vs.
UNITED STATES OF AMERICA ex rel. EDGAR I. SHOTT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

For some thirty-one years prior to this Court's decision in *Griffin v. California,* 380 U.S. 609 (1965), California followed a rule based upon a 1934 amend-

ment to its Constitution which permitted limited comment upon, and consideration of, the failure of an accused to explain or deny evidence presented against him during his criminal trial. This procedure was expressly sanctioned by this Court in *Adamson v. California,* 332 U.S. 46 (1947). In *Griffin,* this Court overruled *Adamson* and held that such comment is now barred by the Fifth Amendment privilege against self-incrimination as made applicable to the States through the Fourteenth Amendment.

Because of the tremendous impact which would be had upon the administration of justice in the State of California by a decision compelling the retroactive application of this doctrine, the Attorney General for the State of California submits this brief in support of the position of petitioner Dan Tehan, Sheriff of Hamilton County, Ohio.

Prior to this Court's decision in *Griffin,* literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be hardened and dangerous criminals under lengthy sentences imposed many years before *Griffin.* Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available. To require a general release of these undeniably guilty felons would have a chaotic effect upon the administration of criminal justice in the State of California.

ARGUMENT

I

THE DOCTRINE ANNOUNCED BY THIS COURT IN GRIFFIN v. CALIFORNIA, SHOULD NOT BE APPLIED TO JUDGMENTS WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION.

In *Griffin v. California,* 380 U.S. 609 (1965), this Court overruled *Adamson v. California,* 332 U.S. 46 (1947), and held that comment upon the failure of an accused to testify during his criminal trial in state court now violates the federal constitution. The sole issue presented in this case is whether this newly defined constitutional right, which prohibits a state trial procedure previously sanctioned by this Court, must be applied retroactively to place in jeopardy the thousands of state court convictions in which such comment occurred.

In *Linkletter v. Walker,* 14 L.Ed.2d 601 (1965), this Court, operating on the premise that the Constitution neither prohibits nor requires that a new constitutional rule be given retroactive effect, held that *Mapp v. Ohio,* 367 U.S. 643 (1961), should not be applied retroactively. The factors this Court considered salient to that determination were summarized as follows:

> "In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of retrospective application of *Mapp.*" *Id.* at 612.

A similar examination of the purpose of the doctrine enunciated in *Griffin* and of the impact which

a holding of compelled retroactivity would have upon the administration of criminal justice leads to the conclusion that it also should be denied retroactive application. The purpose of *Griffin* is not to protect the innocent from conviction, but rather to remove the coercion to testify which an accused might feel were such comment permissible. This purpose would not be served by retroactive application. Furthermore, retroactive application would have a devastating impact upon the administration of criminal justice in those states which permitted comment upon a defendant's failure to testify—a procedure expressly sanctioned by this Court for some fifty-seven years prior to its decision in *Griffin. Twining v. New Jersey,* 211 U.S. 77 (1908); *Adamson v. California,* 332 U.S. 46 (1947).

A. The purpose of the doctrine announced in Griffin v. California would not be served by making the rule retroactive.

After first characterizing the California comment rule as "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify," this Court, in holding that such comment violated the Fifth Amendment, said:

> "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy v. Waterfront Comm'n.,* 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California, supra,* at 614.

Thus, the apparent purpose of the *Griffin* doctrine is to preclude the use in state criminal trials of a procedure which tends to coerce defendants into becoming witnesses by imposing a penalty on their failure to testify. This Court did not hold that the inferences permitted by the California comment rule were unreasonable or unfair and, indeed, recognized that the jury might well draw inferences from a defendant's silence if no comment were made. *Griffin v. California, supra,* at 614.

In holding in *Linkletter* that the doctrine of the *Mapp* case was not to be applied retroactively, this Court distinguished three constitutional decisions which were applied retroactively[1] on the ground that the principle enunciated in each "went to the fairness of the trial—the very integrity of the fact-finding process," while in *Mapp* the fairness of the trial was not in issue. "All that the petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned. . . ." *Linkletter v. Walker, supra,* at 614.

We submit that similarly in *Griffin,* the principle enunciated is one which does not go to the fairness of trial and does not affect the integrity of the fact-finding process. In *Adamson v. California,* 332 U.S. 46 (1947), this Court had occasion to evaluate the fairness of the California comment rule. A majority of this Court said:

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[1] *Griffin v. Illinois,* 351 U.S. 12 (1956); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Jackson v. Denno,* 378 U.S. 368 (1964).

> "California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it." *Id.* at 56.

Recognizing the basic fairness of the California comment rule, a majority of this Court went on to say:

> "The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances." *Id.* at 57-58.

Justice Frankfurter, in a separate concurring opinion, also found the California comment rule eminently fair. He said:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'." *Id.* at 60.

We submit that the purpose of the *Griffin* doctrine would in no way be served by making it retroactive. The purpose of this rule precluding comment is not to protect the innocent from conviction, but rather to remove the coercion to testify which an accused might feel were comment permissible. This is a rule which by its very nature contemplates the prospective prevention of what is now deemed a coercive practice. Its purpose would not be served by overturning past convictions of undeniably guilty defendants simply because the prosecutor and the court followed a procedure which then had the sanction of this Court as a practice completely consistent with due process.

B. A holding that the decision in Griffin v. California must be applied retroactively would undermine the reliance of state courts and prosecutors on decisions of this Court and would seriously impair the administration of criminal justice.

Prior to *Griffin v. California,* this Court, since 1908, had expressly sanctioned properly proscribed comment upon the failure of an accused to testify. *Twining v. New Jersey,* 211 U.S. 77 (1908); *Adamson v. California,* 332 U.S. 46 (1947). Until *Griffin,* such comment was viewed as a state trial procedure which squared completely with due process standards of fairness. *Adamson v. California, supra,* at 55-58.

The existence of *Twining* and *Adamson* are operative facts and the consequential reliance upon them by state courts and prosecutors cannot justly be ignored. To the extent that this Court in *Linkletter* deemed reliance by the various states upon a body of constitutional law in the administration of their criminal courts as an important factor militating against the retroactive application of *Mapp,* an even more compelling case arises for holding against the retroactive application of *Griffin.*

In the illegal search and seizure cases, state law enforcement officials knew that the conduct in issue violated the federal constitution. This Court had expressly so stated in *Wolf v. Colorado,* 338 U.S. 25 (1949). However, prior to *Griffin v. California,* or in any event, prior to *Malloy v. Hogan,* 378 U.S. 1 (1964), state judges and prosecutors had no reason to suspect that comment upon the failure of an accused to testify in any way contravened the federal constitution.

The thousands of cases that were finally decided in reliance upon *Twining* and *Adamson* cannot be obliterated. A newly defined constitutional right which now prohibits a state trial procedure that previously had the express sanction of this Court should not be applied retroactively. To do so would not only impose impossible burdens upon the administration of criminal justice in those states which have allowed comment, but it would have a devastating effect upon the confidence of the bench, the bar, and the general public.

For example, in 1934, the People of the State of California overwhelmingly adopted an amendment to their Constitution which permitted comment upon the failure of an accused in a criminal trial to testify. After the amendment, prosecutors and judges in California followed this constitutional directive as, indeed, they were compelled to do by their oaths of office. Furthermore, such comment was given the express sanction of this Court in 1947 in *Adamson*. During the interim between the constitutional amendment and this Court's decision in *Griffin*, thousands of convictions occurred in which defendants failed to take the stand and comment was made upon that fact. The tremendous impact of a holding that *Griffin* must be applied retroactively is readily apparent.

Moreover, it is common knowledge that numbered among those prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons who are under long term sentences as habitual offenders. It is these hardened and dangerous

criminals under long term sentences whose cases would afford the least likelihood of a successful retrial. To require a general release of such undeniably guilty prisoners would cripple the orderly administration of the criminal laws.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should hold that the doctrine of *Griffin v. California* is not available to attack a final judgment of conviction. We therefore respectfully urge that this Court reverse the decision of the Court of Appeals for the Sixth Circuit in this case.

Dated, San Francisco, California,
August 18, 1965.

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QUESTION PRESENTED

The sole question presented here is whether the doctrine announced in the case of *Griffin* v. *California* should be given retroactive application?

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vs.

UNITED STATES OF AMERICA EX REL. EDGAR I. SHOTT, JR.,

Respondent.

BRIEF OF PETITIONER

STATEMENT OF THE CASE

On May 12, 1961, the Grand Jury of Hamilton County, Ohio, returned an indictment in which the Respondent, Edgar I. Shott, Jr. was charged in two separate counts, with selling a security without a license (in violation of Section 1707.44 (A), Revised Code of Ohio) and with selling an unregistered security (in violation of Section 1707.44 (C), Revised Code of Ohio). Upon the trial, Shott's attorney made several factual admissions and stipulations but Shott did not personally take the stand or testify. Both the assistant prosecuting attorney, and the court, commented upon Shott's failure to testify. The jury returned a verdict finding Shott guilty as charged, and the court imposed a sentence to be served in the Ohio Penitentiary.

Thereafter, on December 11, 1961, the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio, affirmed the judgment of conviction. On June 27, 1962, the Supreme Court of Ohio dismissed the Respondent's appeal, overruled his Motion for Leave to Appeal, and affirmed the judgment. A motion for rehearing was denied by said Court on October 3, 1962.

Certiorari was denied on May 13, 1963, and, on June 17, 1963, a petition for rehearing was, likewise, denied. Before the mandate, issued by the Supreme Court of Ohio to the Petitioner herein, was carried into effect, the Respondent filed a habeas corpus proceeding in the United States District Court for the Southern District of Ohio, Western Division, which proceeding was dismissed. From that order of dismissal, the Respondent appealed to the United States Court of Appeals for the Sixth Circuit. That Court, on the basis of *Malloy* v. *Hogan,* (decided the day before Respondent's hearing), set aside the order of the District Court and remanded the case for further proceedings. From that decision, the Petitioner petitioned for a Writ of Certiorari and an Order Allowing Certiorari was subsequently entered on May 24, 1965.

ARGUMENT

THE RULE OF GRIFFIN vs. CALIFORNIA SHOULD NOT BE RETROACTIVELY APPLIED TO JUDGMENTS WHICH ARE FINALIZED IN THE STATES' COURTS PRIOR TO APRIL 28, 1965.

In the case of *Griffin* v. *California,* 85 S.Ct. 1229 (decided April 28, 1965), this Court determined that the self-incrimination clause of the Fifth Amendment is made applicable to the States by the Fourteenth Amendment; and

that the trial court's and the prosecutor's comments on the accused's failure to testify in that case violated the self-incrimination clause of the Fifth Amendment. The self-incrimination provision of the Fifth Amendment, prior to *Malloy* v. *Hogan,* 378 U.S. 1, 84 S.Ct. 1489, had been held applicable only to federal proceedings. *Adamson* v. *California,* 332 U.S. 46, 67 S.Ct. 1672, *Twining* v. *New Jersey,* 211 U.S. 78, 29 S.Ct. 14, *Bruno* v. *United States,* 308 U.S. 287, 60 S.Ct. 198. And this case, now before the Court, presents the question of whether the (*Griffin* v. *California*) doctrine should be applied to operate retrospectively upon cases, in which such comment was made, which were finally decided prior to April 28, 1965. It is respectfully submitted that this new concept should be given only prospective application.

At the time of the Respondent's trial, Ohio, as did California, permitted comment on the defendant's failure to testify by means of an explicit constitutional qualification of the privilege against self-incrimination. Ohio Const. Article I, Section 10; California Const. Article I, Section 13. Four additional states (New Jersey, Iowa, Connecticut and New Mexico) also permitted such comment, prior to *Malloy* v. *Hogan,* but the permission to do so in these states was not based upon constitutional amendments.

Beginning with *Malloy* v. *Hogan, supra,* wherein the Court required (on the subject of an accused's silence) that the same standards be applied in both federal and state proceedings, and that case was followed by the rule of *Griffin* v. *California, supra,* forbidding comment on the accused's silence through the Fifth Amendment (in its bearing on the States by reason of the Fourteenth Amendment), it appears that the position of the present doctrine is directly opposite that of the previously known require-

ments of Constitutional due process and, as such, the doctrine is similar in effect to such recent cases as *Gideon* v. *Wainwright,* 372 U.S. 335, 83 S.Ct. 792, *Griffin* v. *Illinois,* 351 U.S. 12, and *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct 1684. The Court's silence (in *Griffin*) on the subject of retrospective application of the doctrine is the basis for now bringing that question squarely into focus.

A. The Constitution Neither Prohibits Nor Requires Retrospective Application.

Without intending to here become enmeshed in an academic review of the historical background of the retrospective-prospective problem involved, such review reveals the evolution of the Court's approach to the subject from one of absolute retrospectivity, under the Blackstonian rule (Blackstone Commentaries 69 (1769)), Retroactive Legislation 13-Encyc. Social Science 355 (1934) to the trend toward prospective overruling, suggested as the remedy by the (Blackstonian) critics, (Cardozo, Address to New York Bar Association, 55 Rep. N.Y. State Bar Assn. 263, 296, 297 (1932); *Hilvering* v. *Griffiths,* 318 U.S. 371; *Bailey* v. *Richardson,* 182 F.2d 46, affirmed in 341 U.S. 918; Levy, Realist Jurisprudence and Prospective Overruling, 109 U.Pa.L.R. 1; and Cardozo, The Nature of the Judicial Process (1921), and finally to the most recently developed judicial methods of prospective-retrospective application which more closely approach the achievement of substantial justice by respecting bona fide expectations under the (pre-existing) law. These newly developed judicial methods are prospective in that the over-ruling disposes of outmoded precedents, and are retrospective only to those cases which have not yet been finalized in the State courts. In this way there need be no disappointment to the expectations of

the parties. "Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rules prospective." *Linkletter* v. *Walker*, 33 Law Weekly 4576 at 4579. In that case the Court discussed the prospective trend of the cases dealing with the invalidity of statutes and the effect of decisions overturning long established rules and concluded that the Constitution does not prohibit retrospective application, and neither does it require it. With this basic premise, the Court then reasoned that the decision of applying a subsequent ruling of invalidity to prior final judgments must be preceded by the weighing of the merits and demerits in each case, considering the prior history of the rule in question, its purpose and effect, and whether retrospective application will, in fact, be a deterrent to its future operation. Although the reasoning, in this case, was directed specifically to the Fourth Amendment's prohibitions pertaining to unreasonable searches and seizures it is respectfully submitted that, that approach taken is equally applicable to matters concerning the Fifth Amendment's privilege against self-incrimination.

In other words, this Court determined (in the *Linkletter* case, *supra*) that the question of retrospective application of an overruling decision is not subject to any set principles of retroactivity, but depends, instead, upon a number of considerations, i. e. vested rights, public policy with reference to the rule and its prior application, the purpose of the rule, and the administration of the Courts; and that the Courts should inquire into, and weigh, each of these considerations before deciding whether to give the new rule a retroactive effect.

The Court, in which the issue has been properly presented, should first concern itself with determining the

purpose of the new (overruling) rule. Once such an identification has been made, the Court should weigh the balance to determine whether an absolute general retrospective application will serve that purpose. And lastly, but of equal importance, the Court should determine whether a retrospective application of the new rule will accomplish and promote that purpose in the case then before it.

B. There Is A Considerable Difference Between A Basic Right And An Evidentiary Procedural Right.

1. Denial Of A Basic Right Precludes A Fair Trial.

While the trend of the cases appears to be toward prospective overruling, or perhaps it is better stated to say that the trend indicates a retreat from absolute retrospective overruling, application of a complete or absolute prospective overruling falls far short of being a total remedy to the problem. In some cases retrospective application has been found to be not only desirable but, considering all of the factors involved, equitably mandatory. *Griffin* v. *Illinois,* 351 U.S. 12, *Gideon* v. *Wainwright,* 372 U.S. 335, *Jackson* v. *Denno,* 378 U.S. 368, and other cases dating back to *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801). These cases, it should be noted, all deal with what has been referred to as arbitrary violations of basic rights.

In the *Schooner Peggy* case there were at least two decisive and important considerations which directed the Court into retrospective application: (1) the intervening treaty was actually framed in words which made it retroactive, and (2) the fact that (as Chief Justice Marshall pointed out) this was a case of considerable national and international concern; a case with important foreign policy implications. Chief Justice Marshall, in recognizing these

two considerations, indicated that finding retroactivity necessary in such delicate circumstances would not make the requirement of such application inevitably necessary in cases not charged with similar national and international significance.

In *Griffin* v. *Illinois,* the Court ruled that the denial of an appeal to an indigent prisoner simply because of an inability to pay (the cost of a transcript) was the denial of "an integral part of the (Illinois) trial system for finally adjudicating the guilt or innocence of a defendant". The court based its decision upon the premise that precluding an appeal because a defendant was without funds amounted to the denial, to impoverished persons, of the right to a fair trial. In *Gideon* v. *Wainwright,* the Court determined that a layman's right to counsel, so that his defense could adequately be presented in the trial, was a fundamental right. In short, it appears that in the cases applying the overruling rules retrospectively, the Court first finds that the (complained of) violation had to do with some clearly recognized basic right, a denial of which precludes the accused's getting a fair trial.

2. Violation Of A Procedural Right Does Not Necessarily Preclude A Fair Trial.

As against the findings made in those (*Griffin* v. *Illinois, Gideon* v. *Wainwright,* etc.) cases, this Court recently decided that the rule of *Mapp* v. *Ohio* should not be applied retroactively (*Linkletter* v. *Walker, supra*) because although "the error complained of might be fundamental it is not of the nature requiring us to overturn all final convictions based upon it." Until this decision, the various Courts of Appeal became involved in many conflicts and splits of

authority about whether or not the *Mapp* rule should be applied retroactively; those courts became virtual battlegrounds for the proponents and the opponents of that decision. The Court's reasoning and decision, in the *Linkletter* case, *supra,* settled those conflicts.

It is contended here that the Court's rule in the *Griffin* v. *California* case, *supra,* should not be retrospectively applied based upon the same background and reasoning as is stated in the *Linkletter* case. It is respectfully submitted that, that background and reasoning is most relevant and pertinent to the Petitioner's contention. There are marked similarities between the *Mapp* case and the *Griffin* case and therefore, it is submitted that the reasoning for the refusal to retrospectively apply the *Mapp* rule should likewise be applied in the determination of whether the *Griffin* v. *California* rule should be applied retrospectively. The *Mapp* case overruled *Wolf* v. *Colorado,* 338 U.S. 25, 69 S.Ct. 1359, in which case the federal exclusionary rule of evidence was held not to be applicable to the state courts. *Griffin* v. *California* overruled *Adamson* v. *California,* in which case this Court decided that the Due Process Clause of the Fourteenth Amendment does not preclude, or forbid, the prosecution's comment upon an accused's failure to testify. In both the *Griffin* case and in the *Shott* case now before the court there were prior reliances upon the comment rule. This rule is, in substance, a rule of evidence embodied in the State Constitution and strengthened by the *Adamson* decision. The *Mapp* decision extended the federal exclusionary rule of the Fourth Amendment to the states, and to the state courts, through the Fourteenth Amendment. The *Griffin* v. *California* case extends the self-incrimination provisions of the Fifth Amendment to the states, and to the state courts, through the Fourteenth

Amendment. The doctrine of that case, which is in a sense an exclusionary rule of evidence (very much like *Mapp*), has no direct bearing upon the guilt of an accused. Comments upon an accused's failure to testify might very well have had no effect upon the outcome of the trials of cases previously decided.

C. The Purpose For The Rule Is To Prevent (Future) Infringements Upon An Accused's Privilege Against Self-Incrimination.

The Court, in the *Mapp* case, found that the purpose for that rule was to create an effective deterrent to illegal police action in obtaining evidence. Similarly, it is submitted, the purpose for the rule in *Griffin* is to prevent (future) infringements upon an accused's privilege against self-incrimination; to eliminate a procedural rule which forces persons accused of crimes to take the stand and testify or be penalized for remaining silent. The Court, in that case said,

> "The question remains whether statute or not, the comment rule . . . violates the Fifth Amendment.
>
> "We think it does. It is in substance a rule of evidence that allows the state the privilege of tendering to the jury for its consideration the failure of the accused to testify . . . . It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making the assertion costly." (*Griffin* v. *California, supra,* at pages 1232 and 1233.)

It is therefore submitted that, unlike *Gideon* v. *Wainwright, Griffin* v. *Illinois,* and the other cases in which the Court found retrospective application necessary because of viola-

tions of specific basic minimal rights, the Court's language, in *Griffin* v. *California, supra,* i.e. "in substance a rule of evidence" and "a penalty imposed by courts for exercising a constitutional privilege" is not of a nature which requires the overturning of all final convictions based upon (the comment rule) it.

The Court in *Sisk* v. *Lane,* 331 F.2d 235, in commenting upon the reasoning in the *Mapp* case, stated the following:

> "We think the exclusionary rule in Mapp has been implicit in the Fourth Amendment since the Bill of Rights was adopted, and implicit as against the states since the adoption of the Fourteenth Amendment. But we think that it was not made explicit as a controlling constitutional rule until the Mapp decision in 1961. Consequently we think retroactive application of the rule is not a necessity, as though the rule existed before Mapp and bound state courts."

The Petitioner contends that this reasoning, as pertains to the *Mapp* rule, because of the marked similarities in the *Griffin* v. *California* case with that case, should be equally applicable in deciding the issue presently before the Court.

The *Griffin* case rule is substantially an exclusionary rule of evidence and, as such, is very similar to the *Mapp* case and is unlike the *Gideon* case wherein the Court refers to the "fundamental nature of the right to counsel."

D. Retroactive Application Of The Rule Would Not Further Its Purpose.

The Court decided that the rule in the *Mapp* case was to deter future violations. Therefore, in using the same comparison as has been previously stated, a deterrent effect being the basic purpose intended in the *Griffin* case, that purpose would not be furthered, or accomplished, by

applying the new rule retrospectively. The deterrent effect is intended to compel respect for a new concept of the Constitutional guarantees and, as such, retroactive application of the new rule to all cases (even those finally decided in the State courts prior to *Malloy* v. *Hogan*) would not serve that purpose. The cases finally decided before *Malloy* v. *Hogan*, and *Griffin* v. *California*, were tried in light of, and in reliance upon, the rules set out in the State Constitutions (Ohio and California) and the cases then endorsing such rules (*Adamson* and *Twining*).

The people of the State of Ohio, in their Constitution of 1912, provided for the commenting upon an accused's failure to testify (Ohio Const. Article I, Section 10). California, by a similar constitutional provision, also permitted comment upon the failure of an accused person to take the stand and testify (California Const. Article I, Section 13). And, in addition, such comment has been recognized in the States of New Jersey, Iowa, Connecticut and New Mexico though not by express constitutional provisions. Accordingly, thousands of cases prior to *Griffin* v. *California* have been tried in the various state courts and finally decided on this procedural (comment) rule. Comments were made about accused persons not having testified, courts have instructed juries about the application of such rule, and "guilty" verdicts have been returned.

This Court heretofore, by refusing to include the Fifth Amendment's protection against testimonial compulsion in the guarantee of the Fourteenth Amendment (*Adamson* v. *California*, 332 U.S. 46, 1902; *Twining* v. *New Jersey*, 211 U.S. 77) in effect endorsed the states' rights to the making, adopting and following such (comment) rules. This Court, in *Adamson* v. *California, supra*, stated:

> "The dilemma created by California's law which permits . . . his failure to explain or deny evidence against him to be commented upon by court or counsel and to be considered by court or jury, does not involve such a denial of due process as to invalidate a conviction . . ."

It is submitted that, just as the existence of the *Wolf* doctrine, prior to *Mapp*, was considered, in *Linkletter*, to have been an "operative fact", so too should the existence of the *Adamson* doctrine and *Twining* doctrine, prior to *Griffin* v. *California*, be considered to have been an operative fact within the same meaning, purpose and effect.

Because of the reliances upon the procedural rule as it was then thought to exist, all of the thousands of cases finally decided on the basis of *Adamson* and *Twining*, prior to *Malloy* v. *Hogan* and *Griffin* v. *California*, should be considered to have become vested and, therefore, should not now be disturbed by a retrospective application of the *Griffin* rule. The law of the land permitted the making of comment upon the failure of an accused to testify and it was the duty of the appellate courts to uphold that right. A subsequent denial or overruling of that right (to comment) should not be extended to mean that, that power never existed. To hold otherwise would be catastrophic to the administration of justice.

Although not decisively controlling in the determining of the issue here presented, another factor should be considered. The taking of a new constitutional concept, such as the rule of *Griffin*, and applying it with absolute retroactivity would create a tremendous burden upon the courts of the land by reason of the filing of countless numbers of petitions for writs of habeas corpus by incarcerated prisoners. It is submitted to this court that the numbers of

such cases, likely to result from an absolute retroactive application of the *Griffin* rule, would be of a volume which the courts would be unable to handle with any degree of administrative efficiency and reasonable expenditure of time. And, if the rule were thus applied, such application would not result in a fair application to all prior cases. An uneven application would tend to encourage a disrespect for the sanctity of the judicial system and such disrespect would seriously affect the whole judicial system. An unfairness, in applying the rule retroactively, would result, for example, where persons were convicted in trials in which no transcript of the trial was made. Only those prisoners who could prove that they were denied due process by reason of the prosecution's comments would be entitled to succeed on a petition for release. Or, countless applications would be made by prisoners claiming to have been convicted solely on the basis of such comment, which claims (there being no transcript) could neither be proved or disproved.

E. Retroactive Application Of The Rule To Respondent's Case Would Not Further Its Purpose.

A retroactive application of this (*Griffin*) rule would presuppose that in all cases decided prior to April 28, 1965, the date of the *Griffin* decision, or prior to the decision in *Malloy* v. *Hogan*, 378 U.S. 1, decided in 1964, the guilty verdicts were based solely upon the comments made concerning the failure of the accused to testify and that, therefore, those persons were denied fair trials. In particular, it would presuppose that the Respondent was found guilty solely upon the basis of the comments made. A review of the record filed in this case will reveal that such supposition would be inaccurate.

In keeping with the Court's reasoning in *Linkletter,* the primary purpose of the *Griffin* case being to eliminate a procedural rule which forces persons accused of crimes to take the stand and testify or be penalized for remaining silent, it is submitted that a retroactive application of *Griffin* to the instant case would not at all further the deterrent effectiveness of the rule.

The Respondent was tried, convicted and his case finally decided many months prior to *Griffin.* In the trial of the case, the prosecution, the defense and the court itself had a right to, and did, rely upon the validity of the state trial procedure permitting comment and that such procedure fell within the standards of due process (as they were defined by this court at the time). To apply the newly defined constitutional concept of prohibiting comments upon an accused's failure to testify retroactively to this (*Shott*) case will in no way, further the deterrent purpose obviously intended for the rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should hold that the rule of *Griffin* v. *California* is not retrospectively applicable to finalized judgments of conviction; and that the decision of the Sixth Circuit Court of Appeals, in the Respondent's case, should be reversed.

Dated: Cincinnati, Ohio, September 9, 1965.

MELVIN G. RUEGER
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Hamilton County, Ohio
CALVIN W. PREM
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Ohio

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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 52

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Petitioner,

v.

UNITED STATES OF AMERICA *ex rel.* EDGAR I. SHOTT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENT

QUESTION PRESENTED

Whether, under the majority decision in *Linkletter* v. *Walker,* there is any justification for the reversal of the decision of the Court of Appeals granting habeas corpus to the Respondent.

COUNTERSTATEMENT OF THE CASE

Respondent, a member of the Bar of the State of Ohio, was convicted of a violation of the Ohio Securities Act, Ohio Rev. Code, §§ 1707.01-1707.45. The evidence produced by the State disclosed a single transaction in which Respondent had borrowed $2,000.00 from a friend. The sole creditor-witness testified that he had loaned Respondent the money strictly on the basis of his long acquaintance, personal friendship and his trust that Respondent would pay the money back. (Tr. 36, 37). Respondent gave the witness a note for $2,250.00 signed Shott Investment Co., Edgar I. Shott, Jr., payable in 60 days. The Shott Investment Company was a partnership of Edgar I. Shott, Sr., the Respondent's father, and Edgar I. Shott, Jr., personally and as trustee for his five-year-old son. (Tr. 22). The additional $250.00 represented interest at the rate of 12½ percent for the period of the note. (Tr. 36). The State's evidence further established that Respondent's note was repaid in full when due. (Tr. 33).

The entire testimony at the trial consists of less than 16 pages. (Tr. 23-39). The record reflects that there was no claim or evidence of fraud or impropriety in the single promissory transaction which was the subject of the Blue Sky prosecution. No evidence was introduced by the State that the promissory note which Respondent gave to his friend was part of a public offering of his promissory notes. Indeed, there was no evidence that Respondent had been involved in anything more than a single transaction.

Nevertheless, Respondent was convicted on two counts under the Ohio Securities Act: (1) for selling securities without being licensed as a securities dealer;

and (2) for knowingly selling an unlicensed security. Ohio Rev. Code § 1707.44(A); § 1707.44(C)(1). The method by which Respondent's conviction was obtained without proof of guilt was as follows: At the close of the State's case, counsel for Respondent rested without putting Respondent on the stand, believing that there was no proof in the record that the personal loan to the State's witness was part of a public offering of securities. Instead, Respondent's counsel moved for a directed verdict (Tr. 41). The motion was overruled. The trial court held that the State had made a *prima facie* case, relying on the provision in the Ohio Blue Sky Law which shifted the burden of proof onto the maker of a promissory note to establish it was *not* part of a public offering. Ohio Rev. Code § 1707.45. In practical effect, though not in form, this ruling amounted to a directed verdict in favor of the State. The court informed the jury that the Respondent in failing to go on the stand must be presumed to be guilty in spite of the fact that no rational inference of guilt could be drawn from the innocent and common transaction of borrowing from a friend on a promissory note.

In spite of this ruling, the prosecutor might still have failed to convict because the State's proof consisted only of a single transaction. This is because, in order to constitute a violation, the Ohio Blue Sky Law requires that there have been an unregistered public offering of securities. It provided that any particular "sale" of a security is exempt from the Law if "it is not made in the course of repeated and successive transactions of a similar character." Ohio Rev. Code § 1707.03(B). Moreover, by definition, a "dealer" is one who is engaged in "the ***business*** of the sale of

securities." Ohio Rev. Code § 1707.01(E)(1) (Emphasis added.) To meet these statutory requirements, the prosecutor supplied "proof" of multiplicity of transactions by his affirmative statements in his opening and closing statements to the jury. He told the jury that the Respondent's failure to take the stand was affirmative evidence against him. The prosecutor stated:

> Edgar Shott says by his plea of not guilty that the State of Ohio, that's us, and you, cannot convict him of this crime. He never once told you that it was legal. He never once told you that it complied with the law. He just said, "You can't get me; you can't convict me." That is what he said.
>
> Now, if this were legal, if this were a promissory note, if it was legal when he issued it in September of 1960, isn't it just as legal today? It most certainly is. So I suggest to you, if it was legal and he thought it was legal in September of 1960, he thinks it's legal today; and if he thinks it's legal today, or yesterday, why doesn't Edgar I. Shott, why doesn't this Defendant, charged with these crimes, take that witness stand and tell you? Why doesn't he say, "Members of the jury, I am a lawyer; I am a criminal lawyer that knows the law; I examined this law in September, and any other time that I had dealings, and I say it was legal, and I say to you today it was legal." Why doesn't he do that if it was legal? Why doesn't he do that? No, he chooses to sit there; deny, yes, deny, that the state can convict him. But will he look you in the eye; will he stand up and say to you, "Members of the jury, what I did was proper?" He will not. He has not. He refuses to. At this point, he will not stand up and tell you. Why won't he tell you? *Because it's illegal today, and it was illegal in September of 1960.*

> Do you think this is a single transaction? Do you think this is the only time this occurred; that this piece of paper, this security was sold by Ed Shott? You have heard evidence of one . . .
>
> Appellant's counsel: I will object to that, Your Honor.
>
> The Court: Objection overruled. (Tr. 49) (Emphasis added.)

Toward the end of his closing statement, the prosecutor again told the jury that there was more than one transaction and that the proof of that fact arose from the Respondent's failure to take the stand:

> [The prosecutor] . . . How could you have proof, how could you learn whether or not there was more than one sale? You could learn it only from that person who has the burden of showing that it was not sold to the public, just one, and that person is Edgar I. Shott, Jr. That person alone is the one who, under oath, can sit on that witness stand and look you in the eye and say, "Ladies and gentlemen of the jury, there was one transaction. The only time I sold a piece of paper like that was to Pat Sestito." He could tell you that, and he's got the burden of proving that, and there he sits, and don't let me hear this story that his lawyer told him not to testify. You take it yourself. You are charged with a crime and you don't do it. What you did you thought was legal, completely legal all the way, there was no problem, no hesitation in your mind, but that it was legal.
>
> Could any lawyer, any lawyer in this world, any Clarence Darrow, any Leibowitz, and Fallon, any Geisler, any lawyer will tell you to sit there, that you can't get up and tell this jury what is the truth? You would not; I would not. If the State of Ohio puts me in that chair and says I committed a crime that I didn't commit, you can bet your

bottom dollar that I will be on that witness stand staring you in the eye and telling you I didn't do it.

And there he sits. For just one reason, because he can't look you in the eye. *He can't tell you that, because it isn't so, because there was more than one transaction, there was a multiplicity of transactions, and that is where the crime has been committed.* (Tr. 65-66; see also Tr. 51) (Emphasis added).

On this record the Ohio Court of Appeals and the Ohio Supreme Court sustained Respondent's conviction without opinion. 173 Ohio St. 542, 184 NE 2d 213. Respondent filed a notice of appeal and in the alternative petitioned for certiorari before this Court on December 29, 1962. No. 877, October Term, 1962. In his Jurisdictional Statement, *inter alia,* Respondent argued that the prosecutor's repeated attacks on Respondent for not taking the stand, where the State had proved nothing but innocent conduct, deprived Respondent of a fair trial. Jurisdictional Statement, p. 27, No. 877. October Term, 1962. In other words, when the prosecution had established only an innocent and commonplace transaction—*i.e.,* borrowing money on a single promissory note—due process was not complied with where the sole evidence of guilt was the prosecutor's statement that Respondent must be guilty because he did not take the stand.

On May 13, 1963, in a *per curiam* opinion, Respondent's appeal was dismissed and writ of certiorari was denied, with a dissent by Mr. Justice Black who thought probable jurisdiction had been shown. 373 U.S. 240 (1963).

On June 24, 1963, relying on the opinion of Mr. Justice Brennan in *Fay* v. *Noia,* 372 U.S. 391 (1963),

indicating that a habeas corpus proceeding was an appropriate collateral remedy to raise constitutional issues, even where appeal and petition for certiorari have been denied, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Ohio. (Tr. 3-14). The writ raised the following constitutional questions: (i) whether the Ohio Securities Act, as interpreted, was void for vagueness in the circumstances of this case where the evidence established only that Respondent had, in a single private transaction, given a promissory note to a friend in exchange for a personal loan; (ii) whether the transfer of the burden of proof to the Respondent to prove his innocence and the use of a statutory presumption as evidence that there was an unlawful public offering of securities denied Respondent due process of law; and (iii) whether the prosecutor's closing argument, in which he stated that Respondent's failure to take the stand was evidence that there was a public offering, denied Respondent due process of law.

On July 9, 1963, the District Judge dismissed the writ (Tr. 83); and on July 10, 1963, notice of appeal to the Court of Appeals for the Sixth Circuit was filed. (Tr. 86). The appeal raised all three constitutional arguments noted above. While this appeal from dismissal of the writ of habeas corpus was pending in the Sixth Circuit, a petition for certiorari was filed in the case of *Griffin* v. *California* on October 16, 1963.

Respondent's appeal from the denial of habeas corpus by the District Court was argued before the Court of Appeals on June 16, 1964. The day before, on June 15, the decision of this Court in *Malloy* v. *Hogan,* 378 U.S. 1 (1964), came down. On November

10, 1964, the Court of Appeals for the Sixth Circuit held that, on the comment issue, the *Malloy* decision was controlling and that the prosecutor's comment denied Respondent due process of law. *Shott* v. *Tehan*, 337 F. 2d 990 (6th Cir. 1964) (Tr. 87). The Court of Appeals did not pass on the remaining issues Respondent had raised. On the comment question, it set aside the final order of the District Court and remanded for further proceedings consistent with its opinion, stating:

> On June 15, 1964, the day before the oral argument of this appeal, the Supreme Court in *Malloy* v. *Hogan*, 378 U.S. 1, reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states.
>
> Appellee points out in a supplemental brief that in the *Malloy* case the accused was punished for contempt of court for refusing to answer questions on the ground that it might tend to incriminate him, while in the present case the appellant was not called upon to testify or to answer any questions. We find no merit in this factual distinction. As pointed out hereinabove, the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution.
>
> The ruling in the *Malloy* case is controlling. *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, E.D. La., affirmed, 365 U.S. 569.
>
> The order of the District Court is set aside and the case remanded to the District Court for further proceedings consistent with the views expressed herein. (337 F. 2d at 992; Tr. 90-91).

This case is now pending in the state court awaiting the decision here under the following order sent to the Court of Common Pleas of Hamilton County, Ohio, by the United States District Court on January 5, 1965, after remand:

> IT IS ORDERED that this cause should be and it is hereby remanded to the Court of Common Pleas of Hamilton County, Ohio, for further proceedings consistent with *United States, ex rel. Edgar I. Shott, Jr.* v. *Dan Tehan,* 337 F. 2d 990, within 90 days hereof; otherwise, relator's release shall be final and unconditional.
>
> IT IS FURTHER ORDERED that relator recover from the respondent the costs on appeal, and that the clerk of this court issue execution therefor.
>
> IT IS FURTHER ORDERED that relator shall remain subject to further order of this court.

No steps were taken by the Petitioner to stay the effectiveness of this order. It therefore constituted a final and unconditional release of Respondent before *Griffin* was decided.

On February 10, 1965, after the remand of this case to the Ohio court, the petition upon which certiorari has been granted in this case was filed in this Court by Petitioner. The principal ground of that petition was that Respondent had impliedly waived his constitutional rights. In its Order granting certiorari, the Court noted that Mr. Justice Douglas has suggested that this case be sent back to the District Court for a determination of whether there was such a waiver. Unfortunately, in our opposition we did not quote from the Record to show that Petitioner's waiver claim was frivolous. We now refer to p. 49 of the Record which shows that Respondent's counsel did object to the prose-

cution's comment on his failure to take the stand. (Tr. 49). Petitioner's claim of waiver, which he did not make in the District Court or Court of Appeals, is based on the following excerpt from Respondent's counsel in his address to the jury:

> Now, I would like to meet head-on his allegation that the Defendant did not take the stand in this case and that he is indicating his guilt because he is not taking the stand. I will tell you why the Defendant did not take the stand in this case. Because I refused to let him take the stand, because, in a criminal case, and this is something that I have known long before I went to law school, members of the jury, in the United States of America no man is under an obligation to prove he is not guilty of a crime. In a criminal case in Cincinnati, Hamilton County, United States of America, the state has the burden of proving the Defendant guilty beyond a reasonable doubt, and neither Edgar I. Shott, nor any other man charged with a crime in the Anglo-American system of justice, has any obligation to take the stand, and I can't think of a better time or place to put that principle of law into operation than right here and now. (Tr. 52).

It is impossible to argue that this could constitute a waiver of Respondent's constitutional rights.

On April 28, 1965, the opinion in *Griffin* v. *California* was handed down. 380 U.S. 609 (1965). On May 24, 1965, certiorari was granted in this case. The Court specifically requested argument on the question of the retroactivity of the doctrine announced in *Griffin* v. *California*.

ARGUMENT

A. Assuming That This Court Decides That the Reversal of the Adamson Case By Griffin Should Not Be Retroactively Applied, That Determination in No Way Justifies the Reversal of the Court of Appeals' Decision on Habeas Corpus in This Case.

We point out that the record in this case does not raise the question whether or not *Griffin* should be applied only prospectively following the opinion in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), for two reasons. First, the Court of Appeals decision granting habeas corpus was handed down prior to the *Griffin* case. Certainly the *Linkletter* rule should not be used to reverse previously decided cases which are in accord with the *Griffin* case. An opinion of this Court reversing the decision of the Court of Appeals would take on the flavor of Alice in Wonderland. The reasoning would have to be something like this: "The court below correctly interpreted *Malloy* v. *Hogan.* Its *opinion* granting habeas corpus to the Respondent is approved. Nevertheless, the *decision* must be reversed because, though right in principle, it was handed down at the wrong time. The Court of Appeals should not have anticipated what the decision in *Griffin* was going to be." Thus the Respondent would have to go to jail—after he had won his case in the Court of Appeals and after a mandate had gone down to the Court of Common Pleas in Ohio, directing that Court either to retry Respondent or to release him unconditionally.

Second, even if the Court of Appeals had not granted habeas corpus, the opinion in *Linkletter* would require the rule in *Griffin* to be applied here. In de-

ciding that the *Mapp* doctrine[1] should not be applied retroactively, *Linkletter* made it clear that this did not include convictions in cases which were not *finally* decided before the rendition of the *Mapp* opinion. In all cases pending at the time of the *Mapp* opinion, the decision was to be governed by *Mapp*.

Petitioner's brief attempts to construe the word "final" to mean finality in the state courts. But the *Linkletter* opinion makes it clear that this is not the test. In a footnote in *Linkletter* the Court defined the meaning of the word "final" as follows:

> 5. By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*. (381 U.S. at 622).

It is true that this footnote does not explicitly mention a pending habeas corpus proceeding as one which precluded finality. But it is inconceivable that the Court intended to make a distinction between a pending habeas corpus proceeding and a pending petition for a writ of certiorari.[2] Suppose at the time of the *Griffin* decision there had been three cases pending involving the same constitutional issue, i.e., the right of the prosecutor to comment on the failure of the defendant to take the stand. Suppose that one of these

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[1] *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

[2] The Court's opinions in *Fay* v. *Noia*, *supra*, and *Townsend* v. *Sain*, 372 U.S. 293 (1963) indicate that as a matter of proper judicial administration, certiorari may be denied in a particular case because the Court prefers to review the matters on a writ of habeas corpus where it has the advantage of the District Court's examination of the facts. Thus, denial of a writ of certiorari may in a proper case be an invitation to the Respondent to bring it up again to the Court on habeas corpus.

cases was pending on a writ of habeas corpus. Suppose the second was pending on a writ of certiorari. Suppose that in the third the time for bringing the writ of certiorari had not expired. It would be fantastic to assume that *Griffin* would not apply to the pending habeas corpus for overruling as well as to the pending certiorari petitions.

Thus, the issue in this particular case does not involve the application of the *Griffin* doctrine to cases which were in repose prior to April 28, 1965, the date of the *Griffin* decision. In no sense can the *Shott* case be said to be final when Respondent was asserting the same point, and had won on that point, prior to the *Griffin* decision.

We therefore respectfully suggest that if the purpose of certiorari here was to use this case as a vehicle for determining the retroactivity of *Griffin* in the light of *Linkletter,* certiorari has been improvidently granted. Any opinion which the Court could render on the issue of whether the *Griffin* rule was more like the *Mapp* case than the *Gideon* case[3] would, on the facts before the Court, be mere dicta.

If, however, the opinion of counsel for Respondent on the general issue of retroactivity of *Griffin* in cases where proceedings were not pending at the time of the decision is relevant, we would suggest that *Griffin* should be applied retroactively.

The majority in *Linkletter* pointed out that to make the rule of *Mapp* retrospective would tax the administration of justice because hearings would have to be held on evidence long since destroyed, misplaced or deteriorated. In contrast, to make the *Griffin* rule

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[3] *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

retrospective would simply require the examination of a record to find out whether the prosecution had commented on a defendant's refusal to testify. Only in those cases where no written transcripts of the proceedings existed (and these must be very few since written transcripts have been the rule throughout the country for many years) would the issue be one that could neither be proven nor disproved. And in such cases the burden of proof should be on the convicted defendant.

Moreover, *Linkletter* noted that the Court has uniformly applied due process decisions retroactively where "the principle that we applied went to the fairness of the trial—the very integrity of the fact finding process." 381 U.S. at 639. *See, Eskridge* v. *Washington Prison Bd.,* 357 U.S. 214 (1958); *Doughty* v. *Maxwell,* 376 U.S. 202 (1964); *Jackson* v. *Denno,* 378 U.S. 368 (1964). In contrast, in *Linkletter,* the rule was not applied retroactively in circumstances where "the fairness of the trial [was] not under attack." 381 U.S. at 639. As the *Linkletter* opinion stated, the basic purpose of the *Mapp* rule was to deter unlawful conduct by those sworn to uphold the law and thus prevent future unlawful searches and seizures. The quality of the evidence in the *Mapp* trial was not in issue. Indeed, the quality of the evidence obtained in the *Mapp* case, as in most unlawful search and seizure cases, was superb. It was also squarely revelant and, under the provisions of the Ohio law, impelled the conviction of Mrs. Mapp. In *Linkletter,* the majority felt that the real purpose of *Mapp* was its prospective deterrence to unlawful police conduct and that past convictions, obtained by the use of relevant damning evidence, albeit illegally obtained, need not be disturbed.

But the evidence condemned in *Griffin* v. *California,* as in the instant case, is in practical effect evidence manufactured by the prosecutor in his comment to the jury. As this Court pointed out in *Griffin,* a rule permitting comment by the prosecutor is "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify." 380 U.S. at 613. Such comment on the refusal to testify is,

> a remnant of the "inquisitorial system of criminal justice," *Murphy* v. *Waterfront Comm'n,* 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. (380 U.S. at 614).

What is involved here is not merely disciplining a local county prosecuting attorney. The principle of the *Malloy* and *Griffin* case is that a defendant cannot be forced to convict himself. The standards of a fair trial require that:

> Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. (*Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964)).

Comment on refusal to testify, as the record in this case demonstrates, is an effective and offensive technique to attempt to force a defendant to convict himself. The prosecutor can blur the evidence actually before the jury by his suggestions what the defendant's refusal to take the stand implies. This has been demonstrated here where the prosecutor used Respond-

ent's refusal to testify itself as evidence that there must have been a public offering of securities—a multiplicity of transactions—which is the *sine qua non* of a Blue Sky conviction.

Thus, both the ease of retroactive administration of the *Griffin* rule and the purpose of its promulgation to insure a fair trial require the retroactive application of its standards of due process.

B. If the Court Is Not Persuaded That in No Event Can the Application of the Rule in Linkletter Justify the Reversal of the Court of Appeals in the Case at Bar, in All Fairness It Should Give Consideration to Respondent's Argument Made on Appeal or Petition for Certiorari Which Was Denied in May, 1963, Mr. Justice Black Dissenting.

In our argument on the original appeal in this case, we assumed that the rule in the case of *Adamson* v. *California,* 332 U.S. 46 (1947), was still the law. We argued that even under the doctrine of *Adamson,* the use of the right to comment on Respondent's failure to take the stand in the case at bar violated Respondent's constitutional rights. See, Jurisdictional Statement, No. 877, October Term, 1962, p. 26. Our reasoning was as follows:

The Ohio Securities Act had been interpreted by the trial court to place the burden of proof on any person who engaged in the usual and innocent business transaction of borrowing money on a promissory note to go on the stand and prove that the note was not part of a public offering. On cross-examination of the State's witness, counsel for Respondent thought that the burden had been met. It was clear from the evidence that the note on which indictment was based was a personal loan to a friend. It was for that reason

that counsel for Respondent did not put him on the stand.

Had the State had any evidence that the note on which the prosecution was based was part of a public offering, it should have produced it. Indeed, there is a strong inference from the prosecutor's failure to produce such evidence that it did not exist.

The evidence in this case shows only a single transaction between two friends. The prosecutor therefore obtained a conviction by combining the provisions in the Ohio statute shifting the burden of proof to Respondent to show that a single promissory note was not part of a public offering with his own testimony before the jury that Respondent's failure to take the stand was proof that there were multiple transactions. Hindsight being better than foresight, it may well have been a mistake not to put Respondent on the stand, but, as we show in our Petition for Rehearing of the appeal or writ of certiorari, which was denied in 1963, the case was a cause celebre for days and weeks. See Petition for Rehearing, No. 877, October Term, 1962. Denied, 374 U.S. 858. Respondent had loaned money to a man named Stickler who had extracted millions from the citizens of Cincinnati through the operation of a Ponzi scheme by offering them 25 per cent on their investment in 60 days. Respondent had been a victim of that scheme. There was no claim at his trial that he had been a participant or that his transactions had been tainted with fraud. If Respondent had taken the stand, he would have subjected himself to great publicity and embarrassment. Therefore his counsel, thinking that no case had been established against him, advised him not to testify. (Tr. 52-53).

A fair comment on the failure of Respondent to take the stand as permitted by *Adamson* would have been

to point out to the jury matters in the evidence which required explanation and to tell the jury that under those circumstances Respondent's refusal to explain was significant. But here there was nothing in the record which required any explanation. The prosecutor's comments were in effect affirmative statements that there must have been a multiplicity of transactions similar to the one on which the indictment was based, because if this were not true, the Respondent would have taken the stand. Under these circumstances, the Respondent did not have a fair trial, even under the doctrine of the *Adamson* case.

In our briefs filed in connection with the appeal and alternative writ of certiorari, denied in 1963, we argued, and we think correctly that a presumption of guilt cannot be based on a commonplace and innocent act of signing a single promissory note. We further argued that the prosecutor's use of comment, which relied upon the unconstitutional presumption of guilt, deprived Respondent of a fair trial. Only if this Court believes that the doctrine in the *Linkletter* case compels the reversal of the Court of Appeals' decision on habeas corpus will these issues, and the other issues raised in our original appeal, be before it. To avoid the expense of reprinting our arguments on these issues in this brief, we ask leave of this Court to distribute copies of our original briefs filed in connection with Respondent's appeal. In these papers the justification and the authorities supporting our position that habeas corpus should be granted even under the rule in the *Adamson* case are set forth in detail.

CONCLUSION

The decision of the Court of Appeals in *Shott* v. *Tehan* should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 52

DAN TEHAN, SHERIFF OF HAMILTON COUNTY, OHIO,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL. EDGAR I. SHOTT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR REHEARING

QUESTION PRESENTED

This petition for rehearing does not contest the decision of this Court in so far as it holds that the doctrine of *Griffin* v. *California,* 380 U.S. 609 (1965), will not generally be retroactive. It raises only one

point which we do not think has been thoroughly considered by this Court. Neither the Court's decision in this case nor that in *Linkletter* has squarely focused upon the implications of these retroactivity rulings as they relate to pending habeas corpus cases which raise identical issues to those decided by the Court. We think that to deny the benefit of the new rule of constitutional law to such pending cases is to reduce habeas corpus to a limited and impotent remedy. We submit that the Court should hold that a case is "pending"—so that the rule of *Griffin* would be applied to it—where, as here, an application for habeas corpus has raised before the United States District Court and the Court of Appeals the precise question of the unconstitutionality of the *Adamson* doctrine,[1] where the Court of Appeals granted habeas corpus because it

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[1] In this regard, the Court's opinion implies that Respondent had not raised the issues decided in *Griffin* but merely attempted to take advantage of the benefits of that rule *after* it had been announced. The Court's slip opinion states (p. 2):

> "A few weeks after our denial of certiorari the respondent sought a writ of habeas corpus in the Unied States District Court for the Southern District of Ohio, again alleging various constitutional violations at his state trial, *but again not attacking the Ohio comment rule as such.*" [Emphasis supplied.]

The italicized phrase in the above quotation is an error. Respondent did raise the precise question of the unconstitutionality *per se* of the rule announced in *Adamson* v. *California*, 332 U.S. 46 (1947), both before the District Court and the Court of Appeals.

We have set out the relevant parts of the pleadings before these courts in Appendix A to this brief. The Court's misconception on this critical point may well be the fault of Respondent's counsel because we did not mention in our brief that we had raised the point in both lower courts. Our omission was due to our belief that so long as the matter had been before the Court of Appeals, as the opinion of that court reflected, it was irrelevant whether it had been previously presented.

agreed with Respondent, and where the State's petition for certiorari in this Court was pending at the time *Griffin* was decided. We also contend that the correctly decided decision of the Court of Appeals should not be reversed merely because it reached this Court on review of a decision granting habeas corpus instead of on a direct appeal from the Ohio Supreme Court.

STATEMENT OF THE CASE

Respondent Shott was convicted for violation of the Ohio Blue Sky Law in a case which involved comment upon his failure to take the stand. Following affirmance of his conviction by the Supreme Court of Ohio, on December 29, 1962, notice of appeal to the United States Supreme Court was filed; and on February 27, 1963, the Jurisdictional Statement was submitted to this Court. On May 13, 1963, the Court granted a motion to dismiss the appeal, Mr. Justice Black dissenting, 373 U.S. 240 (1963). On June 7, 1963, a petition for rehearing was denied.[2]

In neither the original appeal nor in the petition for rehearing did we raise the issue of the unconstitutionality *per se* of comment on petitioner's failure to take the stand. In this respect, the appeal was limited to the question whether the particular comment was in violation of the standards of the *Adamson* rule as it had been stated by this Court.

Immediately upon the issuance of the mandate of this Court denying rehearing, Respondent filed a petition for habeas corpus in the Federal District Court on

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[2] Contrary to the statement in the Court's opinion, Respondent did petition for rehearing. See *Brief of Respondent*, p. 17, citing *Shott* v. *Ohio*, Petition For Rehearing, No. 877, October Term, 1962. *Denied*, 374 U.S. 858 (1963).

June 24, 1963, specifically raising the question "whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment."[3] Again, before the Court of Appeals—long before the *Malloy* or *Griffin* cases were decided by this Court—Respondent asserted that the rationale of the *Adamson* decision was no longer controlling as a matter of due process and that any comment whatsoever by the prosecutor violated the Fourteenth Amendment. Respondent stated to the Court of Appeals:

> "We submit that under federal constitutional standards it is a deprivation of due process of law for the State to permit a prosecutor to comment on the defendant's failure to take the stand. * * *
>
> "* * * the course is clear and [we] ask that this Court hold that the prosecutor's comments constitute a denial of due process and a deprivation of Appellant's rights against self-incrimination as guaranteed by the Fourteenth Amendment." Appellant's Brief, pp. 37-38, set forth in Appendix A., pp. 2a, 3a.

On June 15, 1964, over a year after Respondent had filed his habeas corpus application attacking the *Adamson* rule, this Court decided in *Malloy* v. *Hogan*, 378 U.S. 1 (1964), that the Fourteenth Amendment incorporated the privilege against self-incrimination.

On the basis of the *Malloy* decision, reinforced by the previous decisions cited in Respondent's Brief, the Court of Appeals for the Sixth Circuit granted habeas corpus on November 10, 1965, on the sole ground that any comment on a defendant's failure to take the stand is unconstitutional. 337 F.2d 990 (6th Cir. 1964). It

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[3] See Appendix A, page 1a.

thus anticipated this Court's later ruling in *Griffin* v. *California.* It was not until April 28, 1965, six months after the decision in the court below, that this Court handed down its desision in *Griffin* v. *California,* reaching the same conclusion as the Sixth Circuit.

On May 24, 1965, this Court granted certiorari in Respondent's case. 381 U.S. 923. The State's petition for certiorari had not raised the point as to the retroactivity of the *Griffin* decision. Indeed, it was filed before *Griffin* was decided, and, essentially, simply urged a holding contrary to *Griffin.* This Court of its own motion requested argument on the retroactivity issue.

At the time that the *Griffin* case was decided, as far as we know, the only other proceeding attacking the constitutionality of the *Adamson* rule was that brought by Respondent in his petition for habeas corpus. The only decision rejecting the constitutionality of the *Adamson* rule had been made by the court below in granting habeas corpus to Respondent.

The conviction of Respondent was therefore not final in any factual sense at the time *Griffin* was decided. The Court of Appeals had granted habeas corpus. On remand, the United States District Court had directed the State court to give Respondent a new trial or release him. A petition for certiorari had been filed by the State to reverse the decision of the court below on habeas corpus. The mandate of the District Court to the State court was held in suspension until the decision of this Court on certiorari was issued. Therefore, in a factual sense, Respondent's case was pending both before the State court and before this Court at the time of the *Griffin* decision.

ARGUMENT

I

In holding that the judgment against Respondent had become final before the Griffin decision, in the face of the fact that that judgment had been reversed and the precise issue decided by Griffin was on the way to this Court before Griffin was decided, this Court has promulgated a narrow and mechanical definition of "finality" and "pending case" which relegates habeas corpus petitions to second-class status and directly violates the principles expressed in Fay v. Noia.

As we pointed out above, the plain fact is that the judgment against Respondent was not final at the time of the *Griffin* decision. Therefore, the Court's ruling that, because the case was pending on habeas corpus it must be treated differently than one on direct review, severely downgrades the role of habeas corpus and is plainly at odds with the philosophy articulated in a consistent series of this Court's recent decisions underscoring the primacy of habeas corpus. In *Smith* v. *Bennett,* 365 U.S. 708, 712-13 (1961), the Court stated:

> "over the centuries [habeas corpus] has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired' . . . ."

Moreover, "the language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary." *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963).

Yet, as a result of the Court's decision in the present case, the role of habeas corpus is not plenary at all. Respondent, a habeas corpus petitioner, has won his case; yet he must go to jail. On the other hand, a defendant who never even raised the issue on which the Supreme Court's decision was based, but whose case was pending on direct review, is nonetheless belatedly permitted to raise the constitutional issue after *Griffin* and, as a result, to go free.[4] Thus, after this Court has in recent years endeavored to give habeas corpus a role in the federal system consonant with "the extraordinary prestige of the Great Writ," (*Fay* v. *Noia,* 372 U.S. 391, 399 (1963)), its present decision is a great step backward, placing habeas corpus petitioners in a second-class status.

Not only is this Court's decision in the present case at war with the philosophy of its other habeas corpus decisions, but it is also directly contrary to the explicit directions given by the Court in *Fay* v. *Noia, supra,* which inform a defendant's counsel that petitions for certiorari while valid are nevertheless futile and time-consuming in the ordinary case and that the preferred way to raise a constitutional issue is by habeas corpus.

Respondent did not raise the issue of the unconstitutionality of *Adamson* in his petition for rehearing of his original appeal, though he could legitimately have

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[4] Compare *O'Connor* v. *Ohio,* Misc. No. 281, decided by this Court on December 13, 1965. In that case, the defendant, in appealing his conviction from the Ohio state courts, did not raise the *Adamson* issue in his petition for certiorari, which was denied. After *Griffin* was decided, O'Connor filed a petition for rehearing of the denial of certiorari, raising the *Adamson* issue for the first time. This Court granted the rehearing and vacated the Ohio judgment, remanding the case to the Ohio courts for proceedings in light of *Griffin* v. *California.*

done so since it was a new ground not embraced in the original appeal. However, the unconstitutionality *per se* of *Adamson* had not been raised or considered by the Supreme Court of Ohio. Thus, it appeared that Respondent could not meet the standards of Rule 19 of this Court's Rules of Procedure. Moreover, we were persuaded that we should not raise this issue on rehearing but rather raise it in a habeas corpus proceeding by the following language in *Fay* v. *Noia,* which had been decided immediately prior to our petition for rehearing:

> "The rationale of *Darr* v. *Burford* emphasized the values of comity between the state and federal courts, and assumed that these values would be realized by requiring a state criminal defendant to afford this Court an opportunity to pass upon state action before he might seek relief in federal habeas corpus. But the expectation has not been realized in experience. *On the contrary the requirement of Darr* v. *Burford has proved only to be an unnecessarily burdensome step in the orderly processing of the federal claims of those convicted of state crimes. The goal of prompt and fair criminal justice has been impeded because in the overwhelming number of cases the applications for certiorari have been denied for failure to meet the standard of Rule 19.* And the demands upon our time in the examination and decision of the large volume of petitions which fail to meet that test *have unwarrantably taxed the resources of this Court.* Indeed, it has happened that counsel on oral argument has confessed that the record was insufficient to justify our consideration of the case but that he had felt compelled to make the futile time-consuming application in order to qualify for proceeding in a Federal District Court on habeas corpus to make a proper record.
>
> * * * * *

> . . . Our function of making the ultimate accommodation between state criminal law enforcement and state prisoners' constitutional rights becomes more meaningful when grounded in the full and complete record which the lower federal courts on habeas corpus are in a position to provide." 372 U.S. 391, 437-438 (1963). [Emphasis supplied.]

If Respondent had disregarded this language from *Fay* v. *Noia,* as the petitioner in the *O'Connor* case did (see, fn. 4 *supra*), and had sought on rehearing of his initial appeal to raise the constitutionality of *Adamson* in the face of Rule 19, he might have been[5] in the same situation as O'Connor and would have been released. Because he did not do so, he must go to jail. Thus, we find that by adopting habeas corpus as our remedy without first asking for rehearing on direct review, as O'Connor did, we have forfeited the rights of our client under the present decision of this Court that a pending proceeding on habeas corpus brought prior to the *Griffin* decision and pending before this Court is not a "pending case." The result is that O'Connor, who seems to us to have violated the Court's direction in *Fay* v. *Noia,* goes free. Respondent who followed that direction is sent to jail.

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[5] We use the words "might have been" instead of "would have been" because we have no way of knowing whether in 1963 this Court had reached that stage of what Professor Henry Hart of Harvard calls the maturing of collective thought which would have induced it to overrule *Adamson.* However, there were many indications that the Court was ready to reverse *Adamson* in those decisions which we cited in 1963 when we raised the precise issue before the District Court on habeas corpus. (See Appendix A). At the very least, therefore, our procedural error in relying on *Fay* v. *Noia* and not realizing that a habeas corpus proceeding was not a "pending case" deprived Respondent of an opportunity of being the first person to reach the Supreme Court on direct appeal.

The Court does not give any reason, nor do we think any can be found, justifying this result. But if a reason can be found showing that Respondent has misinterpreted the language of *Fay* v. *Noia,* we suggest that the ruling in *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964), cited by this Court in its original decision, should give him relief. In *England* the decision of this Court protected the petitioners from a forfeiture of their rights as a result of an erroneous, but reasonable, interpretation of prior decisions of this Court. By the same token, Respondent should not be penalized for his reasonable attempt to follow the teachings of this Court in *Fay* v. *Noia.*

II

The denial of retroactive application to cases pending on habeas corpus at the time of Griffin has no rational basis in terms of the reasons the Court gives for limiting retroactivity.

Speaking generally, the reason for denying retroactivity to a decision which overrules a previously decided case is that parties who have relied on the previous authority should not be penalized. For example, in many civil cases it has been held that the new decision is "purely prospective." This is because a party in a civil suit who has based his conduct on a decision which is being overruled should not pay damages or otherwise suffer because he has followed the law as previously announced by the Court. *E.g., Gelpcke* v. *Dubuque,* 68 U.S. (1 Wall.) 175 (1864); *Anderson* v. *Santa Anna,* 116 U.S. 356 (1886); *Allen* v. *Holbrook,* 103 Utah 319, 135 P.2d 242 (1943).

In criminal cases, as this Court has recognized in *Griffin,* different considerations apply. There the in-

terest of the state is involved. A few states relied on the *Adamson* and *Twining* decisions for many years. The Court found that the administration of justice in such states might, therefore, be impaired if every convicted inmate of the penitentiary would have to be retried under the new ruling in *Griffin*. The majority of this Court thought that this consideration outweighed the deprivation of constitutional rights which would result from the failure to make *Griffin* generally retroactive as to judgments which had become "final" at the time of the *Griffin* decision.[6] We believe that the principal consideration which prompted the Court to hold the *Griffin* rule generally prospective was to avoid the factual situation which occurred in *Linkletter*

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[6] In this connection the Court said:

"The last important factor considered by the Court in *Linkletter* was 'the effect on the administration of justice of a retrospective application of *Mapp*.' 381 U.S. at 636. A retrospective application of *Griffin* v. *California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*. A retrospective application of *Mapp* would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number. A retrospective application of *Griffin* would have an impact only upon those States which have not themselves adopted the no comment rule, apparently six in number. But upon those six States the impact would be very grave indeed. It is not in every criminal trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years." Slip Opinion, pp. 12-13.

where, *immediately after Mapp was decided,* the petitioner filed a habeas corpus application. However, the desire to avoid this result with respect to *Griffin* simply cannot justify treating a pending habeas corpus proceeding raising the identical issue in the same fashion as a case which was not pending at the time *Griffin* was decided. So far as we know, Respondent's case is the only one which had raised the constitutionality of *Adamson* at the time *Griffin* was decided. Certainly there can be no effect whatever on the general administration of justice in Ohio or elsewhere if *Griffin* is made retroactive with respect to this single Respondent or to any others who might have similarly raised the same issue.

We submit that the proper distinction between direct review and so-called collateral attack is one which goes no further than to limit those issues which can properly be raised on collateral attack to such matters as constitutionality, newly discovered evidence, etc. However, with respect to those issues which have been properly raised on collateral attack, the case remains pending on such issues until they are decided; the judgment is not final until the decision on the collateral attack becomes final. In stating that the judgment was final against Respondent in the face of the fact that he has *won* his case on collateral attack in the court below, this Court is going back to the technicalities of the old Common Law writ system where a plaintiff with a just cause of action lost because he brought his action in trespass rather than trover.

Thus, we do not here challenge the Court's general statement that *Griffin* should not be applied retroactively to a case in which the judgment of conviction was final prior to the announcement of the *Griffin* rule.

However, we do assert that the Court's decision to draw the line of "finality" at the point of the conclusion of direct review, so as to exclude pending habeas corpus cases, imposes an unfair result which is neither necessitated nor justified by the policy against wholesale jail delivery which the Court is attempting to avoid.

III

The discriminatory line drawn by this Court to cut off the rights of pending habeas corpus petitioners cannot be defended on the basis of any of the Court's previous decisions.

When this Court decided in *Linkletter* v. *Walker,* 381 U.S. 618 (1965), that the *Mapp* rule was to be generally prospective, it limited retroactivity to cases which had not become "final" before *Mapp* was decided. As far as determining when a case became "final," the Court offered the following guidance:

> "By final we mean where the judgment of conviction was rendered, *the availability of appeal exhausted,* and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio.*" 381 U.S. at 622, n. 5. [Emphasis supplied.]

The precise issue whether a distinction should be made between a case pending on habeas corpus and one pending on certiorari was not before the Court in *Linkletter.* Reading the above quotation in connection with the explicit directions in *Fay* v. *Noia,* we thought that the words "where . . . the availability of appeal [was] exhausted" should be liberally construed to include an appeal to the United States Court of Appeals, the direct review of which is now before this Court. In its present opinion, however, this Court adopts a narrow and strict interpretation of the above quoted language which at most was only a dictum in *Linkletter.*

In announcing this rule of limited retroactivity in *Linkletter,* the Court relied on a line of cases which we think are wholly inapposite. Each of these decisions involved a statutory change, constitutional amendment or new treaty agreement which intervened between the time of trial and appeal. In such cases, sensibly, the courts applied the provisions of the newly enacted legislation. *E.g., United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 102 (1801); *Carpenter* v. *Wabash Ry.,* 309 U.S. 23 (1940).

In *none* of these cases, however, was the question of retroactivity involved. The Court could not apply the new statute retroactively because Congress had made it purely prospective. For instance, the prohibition cases simply mean that no defendant could be convicted and imprisoned in any case which had not been finally decided at the time the law was repealed. In other words, a defendant could not be sent to jail for a crime which did not exist at the time his case was considered by the reviewing court. Thus, in *United States* v. *Chambers,* 291 U.S. 217 (1934), the defendants had been indicted for violating the National Prohibition Act while the Eighteenth Amendment was still in effect, but prior to trial, that Amendment was repealed. The Supreme Court affirmed the trial court's dismissal of the indictment on the ground that defendants could not be convicted for conduct which the law no longer made criminal.[7]

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[7] The Court, in *Chambers,* added:

> "We are not dealing with a case where final judgment was rendered prior to . . . [repeal]. Such a case would present a distinct question which is not before us." 291 U.S. at 226.

And in *Massey* v. *United States,* 291 U.S. 608 (1934), the Supreme Court reversed a conviction under the Prohibition Act for the benefit of a defendant who, prior to the repeal of the Act,

It is clear that the repeal of the Prohibition Act could not have a retroactive effect. It was not, as in the case of *Griffin,* an admission by the Court that a former decision had been erroneous. No writ of habeas corpus could legitimately have been brought before the repeal of prohibition. Therefore, this Court's distinction between habeas corpus and certiorari cannot be drawn from the *Chambers* line of decisions.

In contrast, in the case of the overruling of a decision, the Court has power to apply equitable principles to the question of retroactivity. For example, if this Court had declared on habeas corpus that the Prohibition Act was unconstitutional, the case would be analogous to the case at bar, but not otherwise.

In sum, the Respondent in this case is the first person to be penalized by the harsh, mechanical rule limiting retroactivity to cases pending on direct review. As a result of the misapplication of the *Chambers* line of decisions, Respondent is being sent to jail, although his habeas corpus application was filed, and was decided in his favor, long before this Court's ruling in *Griffin.*[8]

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had been granted a stay of mandate pending the filing of a petition to the Supreme Court for certiorari. The petition was actually filed after the repeal had taken place. This Court held that under these circumstances the judgment of conviction was not final at the time of the appeal of the Prohibition Act and therefore ordered the Court of Appeals to dismiss the indictment.

[8] In *Linkletter,* the Court also cited *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941), a decision somewhat more similar to the present one. That case held that if there was a change in decisional law by a State Supreme Court which intervened between the trial and appeal of a civil diversity case in the federal courts

IV

By limiting the retroactivity of Griffin to cases pending on direct review, this Court has promulgated a rule which, if consistently applied, will bring about absurd results.

In *Jackson* v. *Denno*, 378 U.S. 368 (1964), the Court overruled *Stein* v. *New York*, 346 U.S. 156 (1953), thereby establishing a new principle of constitutional law.[9] Although the issue was brought up on habeas corpus and not direct review, the Court nonetheless applied the new principle to the case before it and ordered defendant's release.

Suppose that, as might well have happened in this case, Respondent had won his race with *Griffin* and reached the Supreme Court first. Would it have been

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litigating the same issue, the new State rule would be controlling. There is, however, nothing in the Court's decision in *Vandenbark* to indicate that it was limiting its rule to cases on direct review. In fact, of all the decisions holding that a case on appeal is to be governed by the legislation enacted afer the trial, there is only one case even discussing the issue in the context of "direct review" and this case was not even mentioned in the *Linkletter* or *Shott* decisions. In *Hamm* v. *Rock Hill*, 379 U.S. 306 (1964), the Negro defendants were convicted for violation of a State trespass statute when they engaged in a "sit-in" demonstration at the lunch counter of a retail store. Prior to final judgment, their conduct was in effect legalized by the passage of the Civil Rights Act of 1964. The Supreme Court therefore reversed their convictions, stating:

> "... [We have] noted the existence of a body of federal and state law to the effect that convictions *on direct review* at the time the conduct in question is rendered no longer unlawful by statute, must abate."

379 U.S. at 312. [Emphasis supplied.] As previously pointed out, cases such as these, involving *statutory* changes, are altogether unlike the present decision.

[9] See also *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Leyra* v. *Denno*, 347 U.S. 556 (1954).

possible for this Court to have declared *Adamson* unconstitutional and at the same time, in the light of the teachings of *Fay* v. *Noia* and *Jackson* v. *Denno,* to have reversed the Court of Appeals' grant of habeas corpus to Respondent? We doubt it. Yet a literal construction of the holding of this Court, which places habeas corpus in a second class status, would have required the Court to send Respondent to jail because he had raised the issue of constitutionality at the wrong time in the proceedings.

In the alternative, assuming that this Court would adhere to its practice in *Jackson* v. *Denno,* then had Respondent reached this Court first, the new rule of constitutional law would have been applied to him, even if this rule were not given general retroactive effect. This is precisely as it must be in our adversary system of criminal justice; certainly the widely heralded protections of habeas corpus would be a mockery if one who took advantage of them and was proved right in his assertions, were to be denied the benefits of the new rule of constitutional law and find that his efforts had been merely *pro bono publico.*[10] Thus, under the rule of *Jackson* v. *Denno,* had Shott reached this Court before Griffin, the new principle of constitutional law overturning *Adamson* would have become the rule in Shott's case rather than Griffin's and Shott would then have been free. But, under the Court's mechanical rules, Shott must go to jail simply because

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[10] Note that this Court in *Griffin* recognized that it was a retroactive application to apply the new principle of constitutional law announced in that case to the party before it. Nevertheless, the "rule in *Griffin* was applied to reverse Griffin's conviction." *Tehan* v. *Shott,* decided Jan. 19, 1966, Slip Opinion, fn. 2. Accord, as regards the *Mapp* decision, see *Linkletter* v. *Walker,* 381 U.S. at 623.

some other person got to this Court first, raising precisely the same issue on direct review that Shott was raising on collateral review. Having filed his petition for habeas corpus, Shott's only hope of freedom was to win the race to this Court. This reduces the protections of The Great Writ to nothing more than a pari mutuel ticket—a chance for freedom if your case reaches the finish line first.

In light of these substantial defects inherent in the rule announced by the Court, we have tried to ascertain what considerations—unmentioned in the Court's opinion—may have prompted this Court not to apply the *Griffin* decision to habeas corpus petitioners like Shott whose pending writs challenged the *Adamson* rule. The only possible "reason" we can imagine is the Court's fear that applying *Griffin* retroactively to pending habeas corpus petitions might encourage "frivolous" habeas corpus applications. In other words, it might be feared that convicted prisoners, anticipating a constitutional change at some time in the distant future, would file endless habeas corpus applications in order to assure that their writ would be pending when and if a particular rule of constitutional law is some day overruled.

However, this ungrounded assumption assumes a level of sophisticated legal planning which is clearly nonexistent among prisoners and which can pose no serious threat to the administration of justice. And even if a prisoner did file a writ of habeas corpus every year, believing that this Court would some day hold that a particular previous decision denied his constitutional rights, clearly he should not be penalized

merely because he had a continuing faith that this Court would some day correct its past mistake.[11]

CONCLUSION

Under the Court's opinion in this case, Respondent still has the opportunity to present to the Court of Appeals his contention that the nature of the prosecutor's comment in this case deprived Respondent of due process, even under the *Adamson* rule. But even if he wins on this point, he will suffer a severe penalty. He has been attempting to practice law for many years, with a jail sentence hanging over his head and a disbarment proceeding pending before the Ohio Supreme Court. If the case is remanded, these difficulties may continue for as much as a year. We do not think that such an additional penalty is justified by the artificial definition of a "pending case" adopted by this Court.

If forced to reargue these issues, we are hopeful that the court below will sustain our contention, even within the bounds of *Adamson,* that a man who signs a single promissory note cannot be convicted consistent with due process where the sole evidence is the comment of the prosecuting attorney that he must be guilty or else he would have taken the stand. But we see no reason in the orderly administration of justice to compel the Court of Appeals to interpret the *Adamson* rule in a

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[11] In the past this Court has not hesitated to confer important rights on habeas corpus petitioners where justice so required, even though a side effect of the decision might be to encourage frivolous writs of habeas corpus. *E.g.*, compare Goodman, *Use and Abuse of the Writ of Habeas Corpus,* 7 F.R.D. 313 (1947), and Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 444-53 (1963), with *Fay* v. *Noia,* 372 U.S. 391 (1963).

novel case such as this long after that rule has been declared unconstitutional by this Court. In remanding the case, this Court is in effect asking the Court of Appeals to decide the following question: "If this Court had not declared the *Adamson* Rule unconstitutional, what constitutional limits do you think this Court would have put on its exercise?"

We urge that this Court abandon the technical and artificial definition of a "pending" case which excludes the proceeding brought by Respondent which was actually pending long before either *Griffin* or *Malloy* were decided. To inflict this unju[illegible] penalty on Respondent is wholly unnecessary to support the main decision in this case. As we note above, to send the case back to the Court of Appeals is to require that court to decide the moot question as to what might have been the limitations on *Adamson* if *Adamson* were still the law. The result of such a remand may be to send Respondent to jail, cause his disbarment, and deprive his family of a livelihood. Such risks to an individual should not be lightly brushed aside in order to support an arbitrary and unrealistic definition of a "pending" case. And the future consequence may well be that no cautious attorney will dare take the chance of failing to apply for certiorari and rehearing on certiorari

before he resorts to the now dubious writ of habeas corpus.

Respectfully submitted,

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APPENDIX A

(1) Petition for Writ of Habeas Corpus, Shott v. Tehan, No. 5376, Filed in the United States District Court for the Southern District of Ohio on June 24, 1963, p. 7:

j. In further violation of petitioner's constitutional right of due process of law and his constitutional right against self-incrimination, the prosecutor in his closing argument to the jury attacked petitioner for not taking the stand in his defense. . . .

Petitioner was further denied due process of law inasmuch as the prosecuting attorney in his closing argument attempted to introduce "evidence" of an alleged series of loan transactions made by petitioner which purportedly transformed the single private Sestito loan into a part of a "public offering" of petitioner's "securities:" . . .

(2) Memorandum in Support of Petition for Writ of Habeas Corpus, Shott v. Tehan, No. 5376, Filed in the United States District Court for the Southern District of Ohio on June 25, 1963, p. 29:

II. The Prosecution's Closing Argument Deprived Petitioner of Due Process of Law.

Fn.[20] It should be noted that the Supreme Court has indicated a willingness to re-examine the rule of *Adamson* by granting certiorari on June 1, 1963, in *Malloy* v. *Hogan,* No. 1031, which squarely raises the question whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment. If the Court reverses *Adamson,* then, of course, the prosecutor's remarks, on their face, denied Petitioner due process of law. The consistent course of Supreme Court decisions making specific protections of the Bill of Rights enforceable against the states indicates that the *Adamson* rule is in jeopardy. See *Ker* v. *California,* 83 S.Ct. 1623 (1963) (reported at 31 Law Week 4611) (Fourth Amendment) and cf. *Mapp* v. *Ohio,* 367 U.S. 643 (1961) with *Wolf* v. *Colorado,* 338 U.S. 25 (1949)

(Fourth Amendment); *Robinson* v. *California,* 370 U.S. 660 (1962) (Eighth Amendment); *Gideon* v. *Wainwright,* 83 S.Ct. 792 (1963) with *Betts* v. *Brady,* 316 U.S. 455 (1942) (Sixth Amendment). We reserve our right on this point.

(3) Brief for Appellant, Shott v. Tehan, No. 15,538, Filed in the United States Court of Appeals for the Sixth Circuit on Sept. 16, 1963, pp. 37-40:

3. *Whether Appellant's state criminal conviction violated due process of law as guaranteed by the Fourteenth Amendment to the Constitution because the Prosecutor, in closing argument, charged that Appellant's failure to take the stand in his defense was, in effect, an admission of his guilt. Although the District Court answered the question "no," Appellant submits that the answer should have been "yes."*

In closing argument the State prosecutor commented repeatedly on Appellant's failure to take the stand to testify in his defense. Such comment apparently is authorized by the Ohio Constitution.

We submit that under federal constitutional standards it is a deprivation of due process of law for the State to permit a prosecutor to comment on the defendant's failure to take the stand. Clearly, under federal standards, it is a violation of the self-incrimination clause of the Fifth Amendment for a federal prosecutor to comment on a defendant's failure to take the stand. And under the present standards of due process, we submit that the due process clause of the Fourteenth Amendment incorporates the self-incrimination provisions of the Fifth Amendment. Therefore, on this independent ground, Appellant's conviction was obtained in violation of due process.

In 1947 a deeply-divided Supreme Court held in a five-to-four decision that under the standards then prevailing, a state statute or constitution which permits a prosecutor to comment on the defendant's failure to take the stand

does not violate due process. *Adamson* v. *California*, 332 U.S. 46 (1947). However, since that time the consistent course of Supreme Court decisions has been to make the specific protections of the Bill of Rights enforceable against the states. See, *Ker* v. *California*, 83 S.Ct. 1623 (1963) (Fourth Amendment); and *cf.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) *with Wolf* v. *Colorado*, 338 U.S. 25 (1949) (Fourth Amendment); *Robinson* v. *California*, 370 U.S. 660 (1962) (Eighth Amendment); *cf.*, *Gideon* v. *Wainwright*, 83 S.Ct. 792 (1963) *with Betts* v. *Brady*, 316 U.S. 455 (1942) (Sixth Amendment). These cases clearly indicate that the rationale of the *Adamson* decision is no longer controlling.

It is of signal importance that the Supreme Court has indicated its intent to re-examine the rule of *Adamson* by granting certiorari, in *Malloy* v. *Hogan*, October Term, 1963, No. 110, a case which squarely raises the question whether the Fifth Amendment right against self-incrimination is enforceable against the states through the Fourteenth Amendment. A reversal of *Adamson*, of course, would make the prosecutor's remarks, on their face, a denial of due process of law.

We submit that the course is clear and ask that this Court hold that the prosecutor's comments constitute a denial of due process and a deprivation of Appellant's rights against self-incrimination, as guaranteed by the Fourteenth Amendment.

However, in the alternative, we submit that the prosecutor's conduct violated due process even under the *Adamson* standards. The comment in this case goes so far that when coupled with the instructions of the trial court, it amounts to a directed verdict. We do not think that the doctrine of the *Adamson* case should go beyond permitting comment upon the defendant's failure to explain evidence against him. Here there is no evidence against the defendant that there was a "multiplicity of transactions"

except the statements of the prosecutor in his address to the jury.

The Supreme Court has held that the State's failure to afford a defendant a fair hearing "violates even the minimal standards of due process." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The prosecutor, as the representative of a sovereign whose obligation is to govern impartially, has a duty to insure that a fair hearing is actually provided. *Berger* v. *United States*, 295 U.S. 78 (1935). When state prosecutors have been guilty of gross misconduct in trying a criminal defendant, the Supreme Court has not hesitated to grant relief to protect the rights of due process. See *Alcorta* v. *Texas*, 355 U.S. 28 (1957); *Townsend* v. *Burke*, 334 U.S. 736, 740 (1948); *Mooney* v. *Holohan*, 294 U.S. 103, 112-13 (1935). *Cf., Adamson* v. *California*, 332 U.S. 46, 58 (1947); *Buchalter* v. *New York*, 319 U.S. 427, 431 (1943); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

Similarly, this Court has recognized the fundamental responsibility of the sovereign to provide a fair trial and has on numerous occasions reversed lower court decisions because of misconduct of the prosecutor. See, *United States* v. *Dunn*, 299 F. 2d 548, 556 (6th Cir. 1962); *Oliver* v. *United States*, 202 F. 2d 521, 523 (6th Cir. 1953); *Ross* v. *United States*, 180 F. 2d 160, 167 (6th Cir. 1950); *Pierce* v. *United States*, 86 F. 2d 949 (6th Cir. 1936). In the *Ross* case, the prosecutor's "prejudicial and inflammatory" closing argument was the basis of the reversal. 180 F. 2d at 167. The prosecutor there, as here, attacked defendant for alleged activities which went far beyond anything in the record and which were highly prejudicial to defendant.

This record demonstrates the unusual situation where the prosecutor in his closing argument, has stepped beyond the basic standards of fair procedure and necessarily precluded a fair and reasoned consideration of the evidence by the jury. This denied Appellant due process of law.

First, in his closing statement, the prosecutor repeatedly attempted to introduce evidence of an extended series of similar loan transactions. This was clearly improper because the evidence in this record is limited to a single private loan transaction which the creditor-witness himself stated was the only loan transaction in which he and the Appellant were involved. *Ross* v. *United States, supra.* Clearly, due process demands that an accused be convicted only by evidence in the record, *Thompson* v. *Louisville,* 362 U.S. 199 (1960), and not by the prosecutor's constant charge that Appellant had entered into a series of promissory transactions.

Further, the prosecutor's repeated, startling attacks against Appellant for not taking the stand is a deprivation of due process in these circumstances where the State had proved nothing but innocent conduct. The prosecutor's statements were clearly unfair and infringed upon Appellant's rights against self-incrimination. The prosecutor demanded a conviction based not upon evidence of record, but solely upon an inference of guilt because Appellant had refused to take the stand in his defense. *Cf., Adamson* v. *California,* 332 U.S. 46, 58 (1947). Thus, the prosecutor's conduct fell below the standards of due process. As the Supreme Court said in *Viereck* v. *United States,* 318 U.S. 236, 248 (1943):

> "He [the Prosecutor] may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

SUPREME COURT OF THE UNITED STATES

No. 52.—October Term, 1965.

Dan Tehan, Sheriff of Hamilton County, Ohio, Petitioner, *v.* United States ex rel. Edgar I. Shott, Jr.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[January 19, 1966.]

Mr. Justice Stewart delivered the opinion of the Court.

In 1964 the Court held that the Fifth Amendment's privilege against compulsory self-incrimination "is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy* v. *Hogan*, 378 U. S. 1, 6. In *Griffin* v. *California*, decided on April 28, 1965, the Court held that adverse comment by a prosecutor or trial judge upon a defendant's failure to testify in a state criminal trial violates the federal privilege against compulsory self-incrimination, because such comment "cuts down on the privilege by making its assertion costly." 380 U. S. 609, 614. The question before us now is whether the rule of *Griffin* v. *California* is to be given retrospective application.

I.

In the summer of 1961 the respondent was brought to trial before a jury in an Ohio court upon an indictment charging violations of the Ohio Securities Act.[1] The respondent did not testify in his own behalf, and the prosecuting attorney in his summation to the jury com-

[1] Revised Code of Ohio, §§ 1707.01–1707.45.

mented extensively upon that fact.[2] The jury found the respondent guilty, the judgment of conviction was affirmed by an Ohio court of appeals, and the Supreme Court of Ohio declined further review. 173 Ohio St. 542, 184 N. E. 2d 213. The respondent then brought his case to this Court, claiming several constitutional errors but not attacking the Ohio comment rule as such. On May 13, 1963, we dismissed the appeal and denied certiorari, MR. JUSTICE BLACK dissenting. 373 U. S. 240. No petition for rehearing was filed. All avenues of direct review of the respondent's conviction were thus fully foreclosed more than a year before our decision in *Malloy* v. *Hogan*, *supra*, and almost two years before our decision in *Griffin* v. *California*, *supra*.

A few weeks after our denial of certiorari the respondent sought a writ of habeas corpus in the United States District Court for the Southern District of Ohio, again alleging various constitutional violations at his state trial, but again not attacking the Ohio comment rule as such. The District Court dismissed the writ, and the respondent appealed to the United States Court of Appeals for the Sixth Circuit. On November 10, 1964, that court reversed, noting that "the day before the oral argument of this appeal, the Supreme Court in Malloy v. Hogan . . . reconsidered its previous rulings and held that the Fifth Amendment's exception from self-incimination is also protected by the Fourteenth Amendment

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[2] Since 1912 a provision of the Ohio Constitution has permitted a prosecutor to comment upon a defendant's failure to testify in a criminal trial. Article I, § 10, of the Constitution of Ohio provides, in part, as follows: "No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel."

Section 2945.43 of the Revised Code of Ohio contains substantially the same wording.

against abridgment by the states," and reasoning that "the protection against self-incrimination under the Fifth Amendment includes not only the right to refuse to answer incriminating questions, but also the right that such refusal shall not be commented upon by counsel for the prosecution." 337 F. 2d 990, 992.

We granted certiorari, requesting the parties "to brief and argue the question of the retroactivity of the doctrine announced in *Griffin* v. *California* . . . ." 381 U. S. 923. Since, as we have noted, the original Ohio judgment of conviction in this case became final long before *Griffin* v. *California* was decided by this Court, that question is squarely presented.[3]

II.

In *Linkletter* v. *Walker*, 381 U. S. 618, we held that the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, was not to be given retroactive effect. The *Linkletter* opinion reviewed in some detail the competing conceptual and jurisprudential theories bearing on the prob-

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[3] The Supreme Court of California and the Supreme Court of Ohio have both considered the question, and each court has unanimously held that under the controlling principles discussed in *Linkletter* v. *Walker*, 381 U. S. 618, the *Griffin* rule is not to be applied retroactively in those States. *In re Gaines*, — Cal. 2d —, — P. 2d —; *Pinch* v. *Maxwell*, 3 Ohio St. 2d 212, 210 N. E. 2d 883.

As in *Linkletter*, the question in the present case is not one of "pure prospectivity." The rule announced in *Griffin* was applied to reverse Griffin's conviction. Compare *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411. Nor is there any question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced. Cf. *O'Connor* v. *Ohio*, No. 281 Misc., O. T. 1965, — U. S. —, December 13, 1965.

The precise question is whether the rule of *Griffin* v. *California* is to be applied to cases in which the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari elapsed or a petition for certiorari finally denied, all before April 28, 1965.

lem of whether a judicial decision that overturns previously established law is to be given retroactive or only prospective application. MR. JUSTICE CLARK'S opinion for the Court outlined the history and theory of the problem in terms both of the views of the commentators and of the decisions in this and other courts which have reflected those views. It would be a needless exercise here to survey again a field so recently and thoroughly explored.[4]

Rather, we take as our starting point *Linkletter's* conclusion that "the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective," that there is "no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application," in short that "the Constitution neither prohibits nor requires retrospective effect." Upon that premise, resolution of the issue requires us to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." 381 U. S., at 628–629.[5]

III.

Twining v. *New Jersey* was decided in 1908. 211 U. S. 78. In that case the plaintiffs in error had been convicted by the New Jersey courts after a trial in which the judge had instructed the jury that it might draw an adverse inference from the defendants' failure to testify. The plaintiffs in error urged in this Court two propositions: "first, that the exemption from compulsory self-

[4] See *Linkletter* v. *Walker*, 381 U. S. 618, 622–628.

[5] For a recent commentary on the *Linkletter* decision and a suggested alternative approach to the problem, see Mishkin, The Supreme Court 1964 Term—Foreword: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56.

incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar." 211 U. S., at 91. In a lengthy opinion which thoroughly considered both the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment, the Court held, explicitly and unambiguously, "that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." 211 U. S., at 114. Having thus rejected the first proposition advanced by the plaintiffs in error, the Court refrained from passing on the second. That is, the Court did not decide whether adverse comment upon a defendants' failure to testify constitutes a violation of the federal constitutional right against self-incrimination.*

The rule thus established in the *Twining* case was reaffirmed many times through the ensuing years. In an opinion for the Court in 1934, Mr. Justice Cardozo cited *Twining* for the proposition that "[t]he privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." *Snyder* v. *Massachusetts*, 291 U. S. 97, 105. Two years later Chief Justice Hughes, writing for a unanimous Court, reiterated the explicit statements of the rule in *Twining* and *Snyder*, noting that "[t]he compulsion to

* "We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself and not a denial of it . . . . The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution." 211 U. S., at 114.

which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify." *Brown* v. *Mississippi*, 297 U. S. 278, 285. In 1937 the Court again approved the *Twining* doctrine in *Palko* v. *Connecticut*, 302 U. S. 319, 324, 325–326. In *Adamson* v. *California*, 332 U. S. 46, the issue was once more presented to the Court in much the same form as it had been presented almost 40 years earlier in *Twining*. In *Adamson* there had been comment by judge and prosecutor upon the defendant's failure to testify at his trial, as permitted by the California Constitution. The Court again followed *Twining* in holding that the Fourteenth Amendment does not require a State to accord the privilege against self-incrimination, and, as in *Twining*, the Court did not reach the question whether adverse comment upon a defendant's failure to testify would violate the Fifth Amendment privilege.[7] Thereafter the Court continued to adhere to the *Twining* rule, notably in *Knapp* v. *Schweitzer*, decided in 1958, 357 U. S. 371, 374, and in *Cohen* v. *Hurley*, decided in 1961, 366 U. S. 117, 127–129.

In recapitulation, this brief review clearly demonstrates: (1) For more than half a century, beginning in 1908, the Court adhered to the position that the Federal Constitution does not require the States to accord the Fifth Amendment privilege against self-incrimination. (2) Because of this position, the Court during that period never reached the question whether the federal guarantee against self-incrimination prohibits adverse comment upon a defendant's failure to testify at his

[7] As the Court pointed out in *Adamson*, 332 U. S., at 50, n. 6, this question had never arisen in the federal courts, because a federal *statute* had been interpreted as prohibiting adverse comment upon a defendant's failure to testify in a federal criminal trial. See 20 Stat. 30, as amended, now 18 U. S. C. § 3481; *Bruno* v. *United States*, 308 U. S. 287; *Wilson* v. *United States*, 149 U. S. 60.

trial.[8] Although there were strong dissenting voices,[9] the Court made not the slightest deviation from that position during a period of more than 50 years.

Thus matters stood in 1964, when *Malloy* v. *Hogan* announced that the Fifth Amendment privilege against self-incrimination is protected by the Fourteenth Amendment against abridgment by the States (378 U. S., at 6). Less than a year later, on April 28, 1965, *Griffin* v. *California* held that the Fifth Amendment "in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence. . . ." (380 U. S., at 615.)

IV.

Thus we must reckon here, as in *Linkletter*, 381 U. S., at 636, with decisional history of a kind which Chief Justice Hughes pointed out "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371, 374. It is against this background that we look to the purposes of the *Griffin* rule, the reliance placed upon the *Twining* doctrine, and the effect on the administration of justice of a retrospective application of *Griffin*. See *Linkletter* v. *Walker*, 381 U. S., at 636.

In *Linkletter*, the Court stressed that the prime purpose of the rule of *Mapp* v. *Ohio*,[10] rejecting the doctrine of *Wolf* v. *Colorado*[11] as to the admissibility of unconstitutionally seized evidence, was "to deter the lawless

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[8] In the federal judicial system, the matter was controlled by a statute. See n. 7, *supra*.

[9] See, *e. g.*, MR. JUSTICE BLACK's historic dissenting opinion in *Adamson* v. *California*, 332 U. S., at 68.

[10] 367 U. S. 643.

[11] 338 U. S. 25.

action of the police and to effectively enforce the Fourth Amendment." 381 U. S., at 637. There we could "not say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved." *Ibid.*

No such single and distinct "purpose" can be attributed to *Griffin* v. *California*, holding it constitutionally impermissible for a State to permit comment by a judge or prosecutor upon a defendant's failure to testify in a criminal trial. The *Griffin* opinion reasoned that such comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U. S., at 614. It follows that the "purpose" of the *Griffin* rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents, values described in the *Malloy* case as reflecting "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." [12] 378 U. S., at 7–8.

[12] These values were further catalogued in Mr. Justice Goldberg's opinion for the Court in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, announced the same day as *Malloy* v. *Hogan*, 378 U. S. 1: "The privilege against self-incrimination 'registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized."' *Ullmann* v. *United States*, 350 U. S. 422, 426. [The quotation is from Griswold, The Fifth Amendment Today (1955), 7.] It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminat-

Insofar as these "purposes" of the Fifth Amendment privilege against compulsory self-incrimination bear on the question before us in the present case, several considerations become immediately apparent. First, the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load." Second, since long before *Twining* v. *New Jersey*, all the States have by their own law respected these basic purposes by extending the protection of the testimonial privilege against self-incrimination to every defendant tried in their criminal courts. In *Twining* the Court noted that "all the States of the Union have, from

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ing statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald*, 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' *Quinn* v. *United States*, 349 U. S. 155, 162." 378 U. S., at 55. "[T]he privilege against self-incrimination represents many fundamental values and aspirations. It is 'an expression of the moral striving of the community . . . a reflection of our common conscience . . . .' *Malloy* v. *Hogan*, *ante*, p. 9, n. 7, quoting Griswold, The Fifth Amendment Today (1955), 73. That is why it is regarded as so fundamental a part of our constitutional fabric, despite the fact that 'the law and the lawyers . . . have never made up their minds just what it is supposed to do or just whom it is intended to protect.' Kalven, Invoking the Fifth Amendment—Some Legal and Impractical Considerations, 9 Bull. Atomic Sci. 181, 182." 378 U. S., at 56, n. 5.

time to time, with varying form but uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law." 211 U. S., at 92. See also 8 Wigmore, Evidence (McNaughton rev., 1961), § 2252. It follows that such variations as may have existed among the States in the application of their respective guarantees against self-incrimination during the 57 years between *Twining* and *Griffin* did not go to the basic purposes of the federal privilege. And finally, insofar as strict application of the federal privilege against self-incrimination reflects the Constitution's concern for the essential values represented by "our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' " [13] any impingement upon those values resulting from a State's application of a variant from the federal standard cannot now be remedied. As we pointed out in *Linkletter* with respect to the Fourth Amendment rights there in question, "the ruptured privacy . . . cannot be restored." 381 U. S., at 637.

As in *Mapp*, therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright*, 372 U. S. 335; *Doughty* v. *Maxwell*, 376 U. S. 202; *Griffin* v. *Illinois*,

[13] See n. 12, *supra*.

351 U. S. 12; *Eskridge* v. *Washington Prison Board*, 357 U. S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno*, 378 U. S. 368; *McNerlin* v. *Denno*, 378 U. S. 575; *Reck* v. *Pate*, 367 U. S. 433. By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect.

There can be no doubt of the States' reliance upon the *Twining* rule for more than half a century, nor can it be doubted that they relied upon that constitutional doctrine in the utmost good faith. Two States amended their constitutions so as expressly to permit comment upon a defendant's failure to testify, Ohio in 1912,[14] and California in 1934.[15] At least four other States followed some variant of the rule permitting comment.[16]

Moreover, this reliance was not only invited over a much longer period of time, during which the *Twining* doctrine was repeatedly reaffirmed in this Court, but was of unquestioned legitimacy as compared to the reliance of the States upon the doctrine of *Wolf* v. *Colorado*, considered in *Linkletter* as an important factor militating against the retroactive application of *Mapp*. During the 11-year period between *Wolf* v. *Colorado* and *Mapp* v. *Ohio*, the States were aware that illegal seizure of evi-

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[14] See n. 2, *supra*.

[15] California Constitution, Art. I, § 13.

[16] See *State* v. *Heno*, 119 Conn. 29, 174 A. 181; *State* v. *Ferguson*, 226 Iowa 361, 372–373, 283 N. W. 917, 923; *State* v. *Corby*, 28 N. J. 106, 145 A. 2d 289; *State* v. *Sandoval*, 59 N. M. 85, 279 P. 2d 850.

dence by state officers violated the Federal Constitution.[17] In the 56 years that elapsed from *Twining* to *Malloy*, by contrast, the States were repeatedly told that comment upon the failure of an accused to testify in a state criminal trial in no way violated the Federal Constitution.[18]

The last important factor considered by the Court in *Linkletter* was "the effect on the administration of justice of a retrospective application of *Mapp*." 381 U. S., at 636. A retrospective application of *Griffin* v. *California* would create stresses upon the administration of justice more concentrated but fully as great as would have been created by a retrospective application of *Mapp*. A retrospective application of *Mapp* would have had an impact only in those States which had not themselves adopted the exclusionary rule, apparently some 24 in number.[19] A retrospective application of *Griffin* would have an impact only upon those States which have not themselves adopted the no comment rule, apparently six in number.[20] But upon those six States the impact would be very grave indeed. It is not in every criminal

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[17] In *Wolf* v. *Colorado*, 338 U. S. 25, it was unequivocally determined by a unanimous Court that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. "The security of one's privacy against abitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S., at 27–28.

[18] See, for example, *Scott* v. *California*, 364 U. S. 471, where, as late as December 1960, only a single member of the Court expressed dissent from the dismissal of an appeal challenging the constitutionality of the California comment rule.

[19] See *Elkins* v. *United States*, 364 U. S. 206, at 224–225 (Appendix).

[20] See notes 2, 15, and 16, *supra*.

trial that tangible evidence of a kind that might raise *Mapp* issues is offered. But it may fairly be assumed that there has been comment in every single trial in the courts of California, Connecticut, Iowa, New Jersey, New Mexico, and Ohio, in which the defendant did not take the witness stand—in accordance with state law and with the United States Constitution as explicitly interpreted by this Court for 57 years.

Empirical statistics are not available, but experience suggests that California is not indulging in hyperbole when in its *amicus curiae* brief in this case it tells us that "Prior to this Court's decision in *Griffin*, literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be [those] under lengthy sentences imposed many years before *Griffin*. Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available." There is nothing to suggest that what would be true in California would not also be true in Connecticut, Iowa, New Jersey, New Mexico, and Ohio. To require all of those States now to void the conviction of every person who did not testify at his trial would have an impact upon the administration of their criminal law so devastating as to need no elaboration.

V.

We have proceeded upon the premise that "we are neither required to apply, nor prohibited from applying, a decision retrospectively." *Linkletter* v. *Walker*, 381 U. S., at 629. We have considered the purposes of the *Griffin* rule, the reliance placed upon the *Twining* doctrine, and the effect upon the administration of justice

of a retrospective application of *Griffin*. After full consideration of all the factors, we are not able to say that the *Griffin* rule requires retrospective application.

The judgment is vacated and the case remanded to the Court of Appeals for the Sixth Circuit for consideration of the claims contained in the respondent's petition for habeas corpus, claims which that court has never considered.

It is so ordered.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissents for substantially the same reasons stated in his dissenting opinion in *Linkletter* v. *Walker*, 381 U. S. 618, at p. 640.

THE CHIEF JUSTICE took no part in the decision of this case.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.